
United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Testimony.
(For Transcript of Record, see Other Volume.)
(IN TWO VOLUMES)

GOLCONDA CATTLE COMPANY, a Corporation,
Appellant,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

VOLUME II.
(Pages 305 to 677, Inclusive.)

Upon Appeal from the United States District Court for the
District of Nevada.

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No. 2143

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(Testimony of Ray Haws.)

Q. How long would that country support those sheep in the spring time; how long would the feed last for those 15,000 head of sheep that ranged in through here?

A. I don't know, I am not a very good judge of anything like that.

Q. Is it not true after the sheep had gotten through lambing in through there—by the way, this is early spring feed through here, is it not? A. Yes.

Q. After the sheep had gotten through lambing and feeding on the early spring feed in there, there was very little feed left in that country, wasn't there?

A. There wasn't a great deal left.

Q. And the practice has been to feed off that country in the spring feeding of sheep, has it not; I am speaking now of this Government territory in here between Willow Creek and Rock Creek; that is correct, is it not?

Mr. PLATT.—I desire to state this question of testifying as to customs and practices, if that is material testimony, the Government might subpoena many witnesses who could testify as to the custom and policy of the Golconda Cattle Company, and its policy as to outside holders of cattle and sheep. If your Honor rules the policy of stock owners, and the policy of the defendant company is testimony, I shall want an opportunity to subpoena many more witnesses. [252]

The COURT.—My view of this case inclines me to think it is testimony of very little weight. I don't really think the intention in a civil suit is a very im-

(Testimony of Ray Haws.)

portant consideration anyway. I don't think it is worth while to consume a great deal of time questioning witnesses on that point. The policy up there can be very easily and quickly shown, and I don't suppose it can be disputed. From my knowledge of cattlemen's practices, and what they have been doing up in that country for the last 15 or 20 years, it is very clear to me what they want to do, and very little testimony is all that is necessary.

Mr. DENMAN.—Of course what I am trying to show is the movement of cattle, as indicating the openings in the fence, and the fact that there were not any cattle or horses in here in the summertime was due to the fact the whole country was fed off by sheep in the spring.

The COURT.—It naturally follows when sheep have been on that ground in the spring they will eat it off, and go elsewhere. Sheep stay but a very short time any place. And if feed only lasts there two months, very few cattle or sheep will remain there after the feed is gone.

Mr. DENMAN.—(Q.) When you spoke of sheep ranging in there, you saw Noble's sheep in there, didn't you? A. No, not Noble's sheep.

Q. How many years were you in there?

A. I was four or five years.

Q. In the springtime?

A. Yes, sir; always in the springtime, when I rode in there.

Q. You claim to have ridden in this country through here? A. Yes.

(Testimony of Ray Haws.)

Q. And you never saw any of Noble's sheep in there during that time—I withdraw that question. Did you ever see any of Nelson's [253] sheep in there? A. Yes, sir.

Q. And you always saw them in there in the spring-time when you were in there? A. Yes.

Q. You say you came through here in the year 1910, in September, with Flocker and Gray?

A. Yes.

Q. Did you cross this country from Nelson's fence over here, to a place called Opening No. A, drive over there with your wagon? A. Yes, sir.

Q. And you are familiar with this country back up towards Toejam Creek and Toeham Mountain?

A. Yes, sir.

Q. Have you ever ridden back in through this country in here? A. Yes, sir.

Q. That is to say, the country lying to the north-east of, or lying between North's fence and Opening No. A, back there? Have you ridden in that country?

A. Yes, sir.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all, if the Court please.
[254]

[**Testimony of Charles D. Dorsey, for the Plaintiff.**]

CHARLES D. DORSEY, called as a witness for the plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. Will you state your full name?

A. Charles Dennis.

(Testimony of Charles D. Dorsey.)

Q. Where do you live, Mr. Dorsey? A. Midas.

Q. What is your present occupation?

A. Why, I am in the saloon and cafe business at Lovelock, at the present time.

Q. Are you acquainted with what is known as the Squaw Valley property of the Golconda Cattle Company? A. Yes, sir.

Q. State whether or not you were officially connected with the Golconda Cattle Company at any time.

A. At one time I was foreman, in 1907, of the Squaw Valley Ranch.

Q. In what year? A. 1907.

Q. I ask you to step to the plat, Government's Exhibit No. 1, and state whether or not you can identify the plat, as approximately representing the property over which you were foreman?

A. Well, at the time I was in charge of the ranch, the main ranch houses were all about here (indicates); the houses were just west of this Rock Creek.

Q. That is down in section 7? A. Well, yes.

Q. Of township 39 north, range 47 east?

A. Yes, sir; and I had jurisdiction over the whole of Rock and Willow Creek; I was out on those streams pretty near every day, keeping sheepmen from trespassing on the company's land. At the time I took charge of the place, the sheep were going through the Squaw Valley country, and I was on both streams, keeping sheep from trespassing on the com-

(Testimony of Charles D. Dorsey.)

pany's ground at that time, so I was pretty familiar with those two streams.

Q. Can you indicate from the plat approximately the company's [255] land as shown upon the plat?

A. Well, nearly so, yes.

Q. Well, do so, will you? I don't mean in detail, but just generally speaking.

A. Well, as it was described to me by the company—

Mr. DENMAN.—I object; that is hearsay.

Mr. PLATT.—(Q.) Well, was it described to you while you were an official of the company?

A. Yes, sir.

The COURT.—I suppose this is preliminary, is it?

Mr. PLATT.—Yes, your Honor.

The COURT.—Of course you cannot show title in this way; I don't suppose there is any question about the title. Let him give the testimony, and then you can move to strike out.

Mr. PLATT.—I am not trying to establish title, because it has been admitted that practically all of the land in the blue belongs to the Golconda Cattle Company, with a few exceptions.

Mr. DENMAN.—Well, with the exception of the northeast corner. We don't concede that is it practically, at all.

The COURT.—Read the question.

(The reporter reads the question.)

WITNESS.—That was what I was trying to describe.

The COURT.—You may answer it, and counsel

(Testimony of Charles D. Dorsey.)

may object later.

A. I understood at that time that the company had the land along both creeks, so that it would cover all of the water.

Mr. PLATT.—What creeks?

A. Rock and Willow.

Q. Rock and Willow Creeks? A. Yes.

Q. When did you leave the employ of the company? A. October, 1907.

Q. Have you any knowledge at this time as to the fence line of the Golconda Cattle Company during the time that you were foreman, and at the time that you ceased to be foreman and left the employ of the Company?

A. Yes, sir. That is, am I— [256]

Q. You may explain the answer.

A. That is the inclosure at the time I was foreman for the Golconda Cattle Company.

Q. Well, you use the term inclosure, I use the term fence line, now if inclosure makes it plainer to you, I don't care which construction you take for the purposes of the question.

A. Well, the question I am in doubt about is whether the fence lines that were there at the time I was foreman?

Q. Yes. A. Yes.

Q. Assuming, for the sake of this question, that the black line upon the plat, upon the extreme outside of the land indicated in the blue upon the plat, represents generally the fence maintained by the Golconda Cattle Company, can you point out to the Court just

(Testimony of Charles D. Dorsey.)

how much of that fence was built at the time you were foreman, and at the time you left the employment of the company? A. Yes, sir.

Q. I wish you would so state.

A. Well, at the time I left the employment of the company, there was none of this fence.

Q. None of what fence, so we can get it in the record?

A. Well, there was none of this—well, I will say from here.

Q. From a point in section 5 of township 38 north, range 47 east—I hope I won't be accused of leading the witness, if the Court please—up to what other point?

A. Well, in section 17 of the same township.

Q. As I understand it, there was no part of the fence built from section 5 along to section 17?

A. No, at the time I left there there was nothing farther north of section 5, nor east of 9.

The COURT.—There was none north of section 5, and none east of 9? [257]

Mr. PLATT.—Of township 38 north, range 47 east. Is that true?

A. That map is kind of turned around to me.

Q. Well, you will understand that the upper portion of the plat is north. (Explains map to witness.)

WITNESS.—When I was there the fences ran from the ranch houses right along Rock Creek—looking at the map the way I have to, it would have to be turned just around.

The COURT.—(Q.) Let me ask you, Mr. Dorsey,

(Testimony of Charles D. Dorsey.)

how many miles of fence were there on Rock Creek at that time?

Mr. DENMAN.—On the portion shown on the map, your Honor?

The COURT.—North of where Rock Creek and Willow Creek unite.

A. Probably four.

Q. How many miles were there on Willow Creek east of where Willow and Rock Creeks unite?

A. The fence just crossed Willow Creek a little above the junction.

Q. Well, do I understand you that there was no fence on Willow Creek above the junction?

A. Not at that time, no, sir; not when I was there.

Mr. PLATT.—(Q.) Now, how much of a line of fence was there, Mr. Dorsey, further north along Rock Creek, beginning at a point four miles north of the beginning of Rock Creek?

A. Four miles north of the beginning.

Q. Yes.

The COURT.—North of the junction.

Mr. PLATT.—North of the junction between Rock Creek and Willow Creek.

A. In October, 1907?

Q. Yes. A. There was none.

Q. As I understand it, there was no fence at all along Willow Creek? A. No, sir.

Q. In October, 1907?

A. No, sir; there was none. [258]

Q. Now, you testified a moment ago that at times you went along Willow Creek, I think you said, for

(Testimony of Charles D. Dorsey.)

the purpose of keeping sheep trespassers out of the company's land? A. Yes, sir.

Q. Do you remember when you performed that service for the company?

A. Well, at all times when I was in charge.

Q. Well, do you remember what particular sheep trespassers you ordered out?

Mr. LEWERS.—If the Court please, I don't see the relevancy of any inquiries about any sheep trespassers upon the company's land in 1907, so far as it affects an inclosure of May 31st, 1911, is concerned.

Mr. PLATT.—It is a little testimony with reference to the policy of the company, with reference to people who wanted to cross their lands for the purpose of getting upon the Government land.

The COURT.—I don't know that that is relevant. I know what the policy was during those times. There was no question about that. Of course every cattleman tried to keep sheepmen away, and they used every effort and device they could to prevent sheep from coming on their lands, because it impaired the value of their ranges for stock; and it was done everywhere. I don't know that that has any particular bearing on this fencing; but if you think it is a matter of any importance, I presume that will be conceded, because that is unquestionably the fact; there is not a cattleman in that country anywhere who did not use every means he could to prevent sheep from coming anywhere in his neighborhood.

Mr. LEWERS.—In that connection I suggest the proof ought to be followed by what is almost a uni-

(Testimony of Charles D. Dorsey.)

versal fact in this same country, that many cattlemen became also sheepmen, and the custom has become somewhat muddled; and the matter of antagonism has [259] largely disappeared, because of the dual character of the holdings. But I fail to see its relevancy, and object to it on that ground.

Mr. PLATT.—The only object of the testimony is to show that sheep were not permitted to get within that inclosure upon the Government land. Now, I concede, if the Court please, the animosity existing between cattlemen and sheepmen; but so far as this investigation is concerned, we are not concerned with that particular point as to sheep being on private lands of private individuals. The idea is, as I understand it, that the private land owner has no right to exclude sheep from the privilege of grazing upon the public domain, and if he so constructs his fences and so takes up his land that sheep are prohibited from grazing upon the public domain, he is certainly interfering with the right of the public to use the public domain as grazing land.

Mr. DENMAN.—May I ask one question, Mr. Platt? Is it your contention that it is the law that if a man owns a piece of land of the size and character shown here, that he must permit sheep, say a band of 30,000 sheep, to range across that land of his to get on the Government land, and clean out his feed?

Mr. PLATT.—No, I do not contend that; but I do contend that no man, individual, or corporation has the right, as this corporation has done, under the guise of taking up their own land to inclose their own

(Testimony of Charles D. Dorsey.)

land for the purpose of preventing sheep or cattle from grazing upon the Government land.

(Discussion by counsel.)

The COURT.—If this testimony goes to show he was excluding sheep from the inclosure, or land partially inclosed, as you have it there on the map, that is one thing; but the attempt to exclude sheep from land which is practically open, is another matter, [260] and I understand that is the purport of your testimony, that he was attempting to exclude sheep during 1907 from lands on which there were only four miles of fence, whereas your map now shows 44 miles. I do not intend to exclude any testimony which shows efforts on their part to exclude cattle or horses or sheep from that territory surrounded by a fence, even with gaps in it.

Mr. PLATT.—Well, if the Court please, it was leading up to that condition.

The COURT.—You can testify as to that condition, but what happened before that, it does not seem to me throws any light on it. If these were the only people in the country who were keeping everybody off of their territory, and from the very beginning they were the exception, and the only cattlemen, and said this public domain here belongs to us, and everybody keep off of that, perhaps it might show their policy, and show that they intended to defy the law. But I do not think there was any intention to defy the law in that respect, because you cannot say cattlemen are lawless, and every one of them considered that was the proper thing; it was a matter of life and death

(Testimony of Charles D. Dorsey.)

with them; they did everything possible to keep sheep away from their ranges. I will sustain his objection.

Mr. PLATT.—Your Honor will give me the benefit of an exception.

The COURT.—Certainly.

Mr. PLATT.—(Q.) Did you ever have any application, Mr. Dorsey, while you were foreman of the Golconda Cattle Company, for permission to graze sheep, cattle or horses upon any part or portion of the lands represented in the white within the so-called inclosure?

Mr. LEWERS.—To which we make the same objection, that is the [261] same question in another form.

The COURT.—It will be the same ruling and the same exception.

Mr. PLATT.—(Q.) Did you ever have any request made for permission to graze cattle or horses upon the land represented in white as Government land, within that so-called inclosure?

Mr. LEWERS.—To which we make the same objection, as it is the same question; and the further objection it is too remote in time to the issues involved in this case.

The COURT.—It will be the same ruling and the same exception.

Mr. PLATT.—I won't go very far with this; I simply want to preserve the record.

Q. Mr. Dorsey, can you state, as a matter of fact, whether while you were foreman, and notwithstanding your efforts to keep sheepmen off, any cattle,

(Testimony of Charles D. Dorsey.)

horses, or sheep grazed within the inclosure represented upon the plat?

Mr. LEWERS.—To which we object, and hold that the question should be separated, the latter part from the first part, the first part assuming as in evidence certain matters which have been objected to, and which objections have been sustained.

The COURT.—Read the question.

(The reporter reads the question.)

Mr. PLATT.—I don't understand that portion of the testimony was stricken out; if stricken out I will modify the question; but my recollection is that he so testified, and the motion to strike was not made.

Mr. LEWERS.—In order to correct that, I will adopt Mr. Platt's suggestion, and move that the former statement of the witness concerning the exclusion of sheep, be stricken from the record.

Mr. PLATT.—I object on the ground the motion comes too late; that I have interposed another question, and I am interposing [262] that question on an answer made by the witness.

The COURT.—Well, I don't know that it is particularly material. Of course, the testimony tending to show that before the fence was there sheep and cattle ranged over that country freely, and other testimony showing now that they do not, of course is material; and so far as it tends to show that sheep or cattle ranged freely over that territory, then it will be admissible.

Mr. PLATT.—That is the only object.

The COURT.—For that purpose, and that purpose

(Testimony of Charles D. Dorsey.)

alone, it is admitted.

Mr. LEWERS.—My objection went to the first part of the question, and I did not object to the latter portion, which covers what your Honor permits. I objected to the first part because it is indirectly asking the witness to testify whether he excluded sheep.

The COURT.—It can be answered that way then. The question now is whether sheep ranged over that territory in white, while you were there, that territory in white between the two creeks.

A. Yes, there were sheep in there, in the lambing season, and when they were trailing to the north portion of Elko and Humboldt Counties to their summer range.

Mr. PLATT.—(Q.) I wish you would indicate upon the plat, Mr. Dorsey, just where you noticed sheep in there, lambing, grazing, or herding.

A. Well, from section 4 up to section 12, the Golconda Cattle Company used to lamb and graze all over this portion here.

Q. You say over this portion (indicates), if I am following you? A. Yes.

Q. Now will you designate over what sections?

A. Well, there would be 3 and 4 and 33 and 34?
[263]

Q. Wait a minute, 3 and 4 of township 38 north, range 47 east; and what else?

A. 33 and 34; 26, 27, 28, 22, 25, 23 and 24, 12, 13 and 14, township 39 north range 47 east; 7, 8, 9, 16, 17, 18, 19, 20 and 21 of township 39 north, range 48 east. Of course, this is just approximately, I could not say

(Testimony of Charles D. Dorsey.)

just which particular section. That was the Golconda Cattle Company's land.

Q. Now, how many head of sheep, if you know, did the Golconda Cattle Company lamb within that territory that you have just described?

A. Well, at the time I was with them, they had 42,000 head of sheep altogether; I would judge 14,000 to 18,000 head were lambing at that time.

Q. And for how long a period to your knowledge did they so keep sheep upon that land?

A. Well, how long a period each season?

Q. Yes, and for how many seasons, to your knowledge?

A. Well, they started in in March, from that to the latter part of May, and I will say since 1898, that they have been running sheep in there.

Q. Up to and including that date?

A. Well, up to the spring of last year. Now, I won't be positive, Mr. Platt, whether they lambed in there last year or not.

Q. Well, are you positive about their lambing in there in the spring of 1910?

A. Yes, there were sheep lambing there then.

Q. How do you know that?

A. Well, I saw them.

Q. Upon the lands which you have described?

A. Yes, sir.

Q. Now, during the time that you were foreman, state whether or not you ever saw any cattle or horses, or anybody else's sheep grazing upon the lands represented in the white within the so-called inclosure.

(Testimony of Charles D. Dorsey.)

A. Yes, sir. Tom Nelson used to lamb in here some place (indicating), I don't know just exactly the territory, [264] but it was in this northeastern section.

Q. Well, will you indicate upon the plat approximately where that was?

A. Well, I would say from in the North's fence here, northeast of that, and, well, take in this territory here.

Mr. DENMAN.—(Q.) That territory you are describing is territory between what is called Toejam Mountain; the real Toejam Mountain is about 6 miles east of there, is it not?

A. I don't know, I could not say.

Q. But the thing called on here Toejam Mountain, coming down say 4 inches to the south of that, 5 inches to the west, and 4 inches to the north, and then back to the point of beginning, it is in that territory you are describing now, is it not?

A. Yes. Well, now, Nelson started in below the dam; he has a wagon road which starts over the hills here, and he starts to lamb from this territory here, clear through this country.

The COURT.—(Q.) Is that below or above the reservoir?

A. Well, the road starts in below, on Willow Creek.

Mr. PLATT.—(Q.) And where does he proceed?

A. Just as soon as he gets over the divide into a little basin from Willow Creek, he starts lambing one band, always has, that is, up until the time I left there, since then I could not say.

(Testimony of Charles D. Dorsey.)

Q. Since 1907 you have no acquaintance as to that?

A. Not with Nelson's sheep.

Q. Then your testimony, now, is only referable to a period up to the year 1907, when you left?

A. Yes, sir.

Q. And in what direction did he lamb, and over what lands did he go?

A. In a northerly direction from the point just described to Toejam Mountain, or Toejam Creek it was called; I am not familiar with the mountain.

Q. What other cattle, sheep or horses ranged upon those lands, [265] if you know, while you were there; I mean particularly the lands in the white, designated as Government lands, within the inclosure.

A. I don't know of any other sheep grazing there; there were several bunches trailed through that country on the way to their lambing grounds, and the summer ranges.

Q. Now, can you state any particular sheep owners who ranged their sheep during that period?

Mr. DENMAN.—He said they trailed their sheep through, but didn't range there, only the Golconda Cattle Company and Nelson ranged there.

Mr. PLATT.—(Q.) What do you mean by trailing sheep through?

A. Driving them through the country.

Q. State whether or not sheep eat through the country when they are driven, or whether they do not.

A. They certainly eat; we figure on driving 8 miles a day, about 8 miles every night.

(Testimony of Charles D. Dorsey.)

Q. And they eat while they are driven? A. Yes.

Q. Will you state whose sheep those were, if you know?

A. Well, there was Stewart and Carter of Paradise Valley. There was Wheeler; Pedro Laca; and Bernard Brothers, and Thomas Nelson. And that is all that I know of that went through that section of the country at that time.

Q. Now, will you state from which direction those sheep were driven across that country, if you know?

A. Well, they came in right at what is known as the county road, crossed Rock Creek, and got in what was called the Long Ridge, and kept the Long Ridge clear through to a point about what they call Siawappe, probably 6 miles above the Willow Creek dam; and others cut off the other way in a northerly direction, and went out between the North field and Toejam Creek, and over into the reserve. [266]

Q. As I understand it, they came from a westerly direction, did they? A. Yes, sir.

Q. When you saw these sheep coming from that direction, and going in the direction which you stated, state whether or not there were any fences up along the west side of this so-called inclosure.

A. There were none at that time, no, sir.

Q. None at that time?

The COURT.—(Q.) Do you mean that four miles of fence was not there?

A. Oh, it was there, but I mean along the route taken by the sheep; of course they came along the fence, but didn't have to go through it.

(Recess until 1:30 P. M.)

(Testimony of Charles D. Dorsey.)

AFTERNOON SESSION.

CHARLES D. DORSEY, direct examination continued.

Mr. PLATT.—(Q.) Mr. Dorsey, while you were foreman, did you notice any other stock except sheep, that came from the west, and either grazed or were herded upon the so-called Government lands within the inclosure as represented upon the map?

A. Well, not particularly from the west; there was stock roaming those ranges from all directions.

Q. You say there was stock roaming the ranges from all directions? A. Yes, sir.

Q. That is, did you mean the ranges represented as Government land, within the inclosure?

A. Well, as I understand it, horses and cattle have the free run of the range every place, and of course they were grazing all over that country. [267]

Q. Then as I understand it, they came from all directions? A. Yes, sir.

Q. And were the cattle or horses belonging to any particular person, or did they belong to many people?

A. Well, they belonged to nearly everybody in that particular section of the county, that is, the cattle; and the horses there were a great many unbranded, classed as mustangs; and there was other range stock taken care of, and branded, belonging to the same parties that owned cattle around the country there.

Mr. PLATT.—You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) Mr. Dorsey, you spoke of a road that Tom Nelson used to travel; you mean that

(Testimony of Charles D. Dorsey.)

road that started somewhere down here below the reservoir?

A. In general below the reservoir, in here somewhere, just below the junction of this small creek with Willow Creek.

Q. And from there ran over and went out through this, about Opening No. 1, of the quaking-asps?

A. Yes, it went through, commenced here and went through this territory, up into this section.

Q. And it connected up with this road that runs in through by the quaking-asps, and goes off from Tuscarora, doesn't it?

The COURT.—That answer is very indefinite.

Mr. DENMAN.—I will connect it up in a moment.

A. There is a junction of two roads here, and the other one came down toward the dam, and then turned back to Tuscarora.

Q. That is to say, down in through this opening by the quaking-asps, and across the creek here, and down in this direction? A. Yes. [268]

Q. That is Opening No. A, go about through there, and run off towards Tuscarora to the east?

A. Opening No. A?

Q. Well, that is called A (indicating on plat).

A. Yes.

Q. Now, Mr. Dorsey, you say in the springtime during all the time you knew that country, there were large bands of sheep, owned principally by the Golconda Cattle Company and Tom Nelson, on land in this Government territory here? A. Yes, sir.

Q. And by the Government territory here, I mean—

(Testimony of Charles D. Dorsey.)

Mr. PLATT.—Just a moment.

Mr. DENMAN.—I have anticipated your objection. (Q.) And by the Government territory here I mean the Government territory on the white, included between these creeks; that is correct, is it?

A. Yes, sir.

Q. I am speaking all the time now prior to 1907, that you referred to? A. Yes.

Q. And also during that time there were large bands of sheep, or a great many, driven up the county road, through here, and across this Government land, going off, some of them into Toejam Mountain up there and some off to Tuscarora on the road?

A. Yes.

Q. And I suppose it is fair to say 150,000 to 200,000 sheep went through there in the springtime, is it not?

A. No, probably 90 to 100,000.

Q. Ninety to one hundred thousand sheep went through there? A. Yes.

Q. You say there is about two months green food there in the springtime over this territory?

Mr. PLATT.—He did not so testify, he didn't say anything about two months.

Mr. DENMAN.—All right, I withdraw the question.

Mr. PLATT.—I think he said from March until May, which might [269] be two or three months.

Mr. DENMAN.—(Q.) Well, the sheep cleaned it up in that time, from March until May?

A. Not necessarily; the sheep just lambed there, because it was warmer in this particular section of the country than it would be on their summer range,

(Testimony of Charles D. Dorsey.)

and they lambed them here to protect the lambs from the cold; later on drove them into the—

Q. The food gave out there?

A. Certainly, oh, yes, they could have stayed there all summer had there been more water and feed for them, without such long drives.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all. That is the Government's case in chief, if the Court please.

[Indorsed]: * * * Filed May 25, 1912. T. J. Edwards, Clerk. [270]

End Vol. 1.

VOLUME 2.

[Testimony of S. G. Lamb, for the Defendant.]

S. G. LAMB, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. Sheriff, what is your name?

A. S. G. Lamb.

Q. What is your occupation?

A. Sheriff of Humboldt county, Nevada.

Q. How long have you been sheriff of Humboldt county, Nevada? A. Nine years past.

Q. What was your occupation prior to that time?

A. Stockman.

Q. And where have you had experience with handling stock?

A. With Miller and Lux in California; with my father when I was a boy first, then went from there to Miller and Lux, then the Golconda Cattle Com-

(Testimony of S. G. Lamb.)

pany, and from the Golconda Cattle Company to Bliss Brothers.

Q. Are you familiar with this territory between Rock Creek, Toejam Creek, Willow Creek and Siawappe Creek? A. Yes, sir.

Q. Do you see it depicted on the map?

A. Yes.

Q. You have seen that map before, haven't you?

A. I have seen that map, I think it is the same map.

Q. Have you been over that country recently?

A. I was over there somewhere along about the 26th or 27th of last month.

Q. 27th of last month? A. Yes.

Q. Did you ride around those creeks, beginning at the junction of the southeast end of this map, and going to the north, covering the entire territory of the creeks, up to the—

Mr. PLATT.—Well, I object to the question on the ground it is leading. [271]

Mr. DENMAN.—I withdraw the question. (Q.) You say you were in that country about the 27th of last month; where did you go?

A. I went up Willow Creek, crossed Rock Creek and went up Willow Creek, up to the dam; from the dam I followed on up the creek up to Siawappe Corral; from there I followed on up the fence to where the telephone line crosses; from the telephone line I followed up to where there is a clump of trees, where Mr. Nelson's fence joins or comes close to the Pitchfork fence there, or rather the Golconda Cattle Company, there is an opening, and from there I followed

(Testimony of S. G. Lamb.)

on around to what used to be known as North's fence or Noble field, followed around to Toejam Creek, that fence where the gate goes in Toejam, and I followed on down Toejam Creek to Rock Creek, to where the old willow corral is, and from there I went on down to what they call Dutton now.

Q. That is, you followed down the creek?

A. Part of the way along the creek, and part on the outside of the creek.

Q. Could you observe the fences that had been constructed in any part of where you travelled?

A. Yes, sir, that was the idea that I went there.

Q. Let me call attention on this map first to a fence called North's fence, and I want to call your attention to that portion of it where it crosses Toejam Creek, and coming in a southeasterly direction around to the point of this red arrow, at the west end of what is called Opening No. 5; I want to call your attention to that fence.

A. Yes, sir.

Q. Describe the condition of that fence as you saw it when you went through there. I will check this up with its condition earlier.

Mr. PLATT.—I object to the question, if the Court please, upon [272] the ground that the question calls for an answer as to the condition of the fence at a time long subsequent to the filing of the complaint in this action.

Mr. DENMAN.—It is my intention to show that the fence was old and rotting down, and the condition it is now in, from its physical appearance would seem to be one in which it had been for some time, and I will connect it up with Mr. Osborne, who testified it

(Testimony of S. G. Lamb.)

was down something like two or three years ago in there.

Mr. PLATT.—I think, if the Court please, the testimony should be elicited in the regular order, because if the witness has no knowledge of the fence prior to the filing of the complaint, certainly the condition of the fence after that time, whether down or up, would not be material to the issues involved in this case.

The COURT.—I will allow the testimony subject to your objection.

Mr. PLATT.—We note an exception.

A. I found that fence down, in bad condition.

The COURT.—(Q.) What do you call that fence, the North fence? A. The North fence.

Mr. DENMAN.—It is marked on the map as “North’s fence.”

A. We rode across it various places, back and forth, going horseback down there.

Q. What was the condition of the wires?

Mr. PLATT.—Of course my objection goes to all this.

The COURT.—Yes.

A. Broke and rusted. * * *

Mr. DENMAN.—(Q.) Could you tell by the breaks in the wires how long they had been broken?

A. No, they looked like old breaks, could not say for how long.

Q. Were they rusted or not?

A. Yes, sir, they were rusted. [273]

Q. What could you say as to the condition of the posts as you saw them there at that time?

(Testimony of S. G. Lamb.)

A. They were redwood posts, good many of them in fair condition.

Q. And the others?

A. Some was in bad condition, rotted off, most of the posts was in very fair condition.

Q. Where the fence was down what was the condition of the posts?

A. The posts were also down where the fence was down.

Q. What can you say as to the condition of the posts that were down with reference to their being rotted or not rotted?

A. They were rotted, some of them were.

Q. How wide were those openings you saw there?

A. I didn't measure; some were big long openings; some, I guess, was probably two or three hundred yards; there was a large opening where we first came over there to the fence, I would not say how long the opening was; that opening was down along in here where we first came down, where it goes over a little gully going to Toejam Creek, a big opening there, and openings all the way down the fence.

Q. This was in section 31, township 40 north, range 49 east? A. Yes, along in there.

Q. How on the southern boundary of that section?

A. We went from Nelson's fence around up, and then crossed down that Noble fence.

Q. Where did you begin with reference to the west point of the arrow, Opening No. 5, whereabouts did you strike the fence?

A. Is this the fence here (indicating on plat)?

(Testimony of S. G. Lamb.)

Q. No. North's fence on this map runs from there to there, and from there to there (indicating on plat).

A. Well, I think we took the fence off about here somewhere.

Q. That is at the west point of the arrow?

A. Somewhere about there, yes. [274]

Q. And worked what direction along it?

A. Worked north and west.

Q. North and west? A. Yes.

Q. How many openings did you find in it?

A. Well, I didn't count them; it is nearly all openings, down every little ways.

Q. Will that fence hold cattle? A. No, sir.

Mr. PLATT.—Object on the ground it is calling for an opinion or conclusion of the witness.

The COURT.—I will allow the question.

Mr. PLATT.—Exception, if the Court please.

The COURT.—You may have an exception.

Mr. DENMAN.—(Q.) Now, coming easterly from that fence, looking up in the direction of this thing here called Toejam Mountain, is that where Toejam Mountain is located?

Mr. PLATT.—I object, if the Court please, on the ground it is a leading question; and counsel has been repeatedly asking leading questions.

Objection sustained.

Mr. DENMAN.—(Q.) Where, from the point, from this opening called Opening No. 5, in what direction does Toejam Mountain lie?

A. Toejam Mountain, I think lays northeast and southwest.

(Testimony of S. G. Lamb.)

Q. About how far from that opening; I am speaking of the mountain.

A. The Toejam Mountain?

Q. Yes.

A. The summit of that Toejam Mountain?

Q. Yes.

A. Oh, that must lay 3 or 4 miles across there, to the summit.

Q. Now, what can you say as to the country lying between this red line called Opening No. 5, and the territory for two miles east of there, as to the possibility of cattle passing through there? [275]

Mr. PLATT.—I object on the ground it calls for an opinion of the witness.

The COURT.—Just state the facts as you saw them, Mr. Lamb, in response to that question.

A. Why, cattle could pass through there most any place.

Mr. PLATT.—I move that the answer be stricken out on the ground it is a statement of a conclusion of the witness.

The COURT.—I think he had better state the facts, if he knows them, then he can give his opinion.

Mr. DENMAN.—(Q.) Sheriff, how often have you been through that country?

A. I have gathered cattle through there, rode through there, and worked through there.

The COURT.—That is not the place where the fence is down, that is an opening.

Mr. DENMAN.—I am asking what the condition of the country is from the line called Opening No. 5,

(Testimony of S. G. Lamb.)

for two miles east.

Mr. PLATT.—That was not your last question. Please read the question.

(The reporter reads the question.)

Mr. DENMAN.—(Q.) How many times have you been through that country?

A. I can answer directly; 1889 in there various times, we had cattle in there, worked out and in there several times with them; took them in in the summertime, when water was short we scattered our cattle out in there, got them located, and in the fall went in there riding, and getting them out again. I could not tell you how many times I was in that range. Then we worked cattle in there again, I think it was in 1903, camped in that country, worked there several days.

Q. So you are familiar with the shape and outline of the country? A. Yes, sir. [276]

Q. Now, I ask you again, what can you say as to the condition of the country lying easterly and north-easterly of Opening No. 5, for a distance of two miles, with reference to the passability of cattle through there?

A. Well, cattle can feed through there anywhere.

Mr. PLATT.—I object to the question on the ground the question infers an answer calling for the conclusion or opinion of the witness as to whether cattle could pass through that country; a conclusion or opinion which I think the Court should reach from an examination into the facts.

The COURT.—I will allow that answer to stand,

(Testimony of S. G. Lamb.)

because it seems to me this witness has shown sufficient experience with cattle to answer a question of that kind. I want to know something about the condition of the country, a few facts about the condition weighing more with me than the opinions.

Mr. DENMAN.—(Q.) Sheriff, what is the character of that country in there?

A. Rough, and a good stock country; a good summer range, always has been considered so; we always tried—

Mr. PLATT.—As to the considerations—I ask that “always considered so” be stricken out from the answer of the witness.

The COURT.—Well, the word “considered” may be stricken out, and give simply what you have seen yourself.

A. We always used it for a cow country, and tried to work our cattle in the high country every summer we have had cattle in there.

Mr. DENMAN.—(Q.) Describe the land itself lying easterly for two miles from this opening here, and in the opening itself?

A. It is all about the same.

Q. Well, what is that?

A. Low, rough, sparse hills with passes away through there, trails. [277]

Q. Could you drive a wagon through that country?

A. Well, I never did.

Q. Could you? A. I think I could.

Q. What can you say as to the character of the feed in there?

(Testimony of S. G. Lamb.)

A. The feed is good, as a usual thing.

Q. What can you say as to the destination of cattle drifting from the south, if cattle do drift from the south in the springtime, up towards the north in that country.

Mr. PLATT.—We object on the ground the question is leading.

Mr. DENMAN.—(Q.) What direction do the cattle drift from coming up from Humboldt in the spring-time, what general direction?

A. Drift principally north, that is, cattle coming from the River house, driving up that way, they drift north up through Rock Creek, up through that country. And cattle coming in from the other way, from toward the Ivanhoe, and the "25" cattle, they drift in toward, above the dam, along up that way towards the hill.

Q. Is there any natural barrier in there that would stop cattle from going through?

Mr. PLATT.—Object on the ground the question calls for a conclusion of law, as to what a natural barrier is.

The COURT.—I will allow the question.

Mr. PLATT.—Exception on the grounds stated in the objection.

A. There is nothing to stop cattle travelling through that passage there.

Mr. DENMAN.—(Q.) And on beyond it, on the other side, is there anything?

A. They can go on as far as they want to.

Q. Now, have you ever seen any cattle in that

(Testimony of S. G. Lamb.)

country? A. Yes, sir.

Q. How many?

A. We worked cattle in there, lots of cattle in that country.

Q. What do you mean by working, going after and bringing in? [278]

A. Yes, rodeo, and bring them in, drive up and down the country; had a lot of cattle in there one summer; them times before the hard winter there was thousands of cattle in that country then.

Q. Now, coming down on this map along a red fence line called Nelson's fence, to a place marked "Opening No. A," just above where Siawappe Creek divides, a place called "Opening No. A, 300 feet at Nelson's new fence line," did you find any fence to the south of Nelson's fence there?

A. There is an opening between the Nelson fence and the Golconda Cattle Company fence.

Q. Did you find any road there?

Mr. PLATT.—I object, if the Court please.

Mr. DENMAN.—Withdraw the question. (Q.)

What can you say as to the character of that country in there, in that opening, with reference to the possibility of cattle passing through?

A. Cattle could pass through.

Mr. PLATT.—Same objection as I have interposed; it calls for the opinion of the witness, and the question is not directed to the witness' knowledge of the country; and, in addition to that, calls for his opinion as to whether in his judgment cattle could pass through it.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—(Q.) What is the nature of the gap in the fence?

A. There is a gap there I should judge 250 or 300 feet.

The COURT.—(Q.) A gap of 300 feet?

A. Two hundred and fifty to three hundred feet, I didn't measure it, a big wide opening there.

Q. What is the nature of the country in the gap, the land in the gap?

A. Why a man could drive a wagon or anything right through there where the gap was.

Q. Did you drive a wagon through there?

A. No, sir.

Q. Did you see where wagons had been driven through there? [279]

A. I didn't notice where they had been; no, I didn't pay any particular notice.

Q. Let me ask you: Suppose cattle are drifting from the south, north, south of the black line marked as Nelson's fence, running east and west, and east of the line, red line, beginning at that gap and running down to the place called Siawappe corral, cattle wandering in there to the north, what can you say with reference to the natural line of travel for cattle in that gap?

Mr. PLATT.—Same objection, that it calls for a conclusion or opinion of the witness.

The COURT.—Same ruling and same exception.

A. I didn't see anything to keep cattle from drifting that way, looks like it would be a natural way for them to drift, as far as I could see.

(Testimony of S. G. Lamb.)

Q. What can you say with reference to Nelson's fence, directing them or not directing them in that direction? A. It would direct them to that gap.

Mr. PLATT.—Same objection.

The COURT.—Same ruling and same exception.

Mr. DENMAN.—(Q.) What can you say with reference to the fence I have just described on Siawappe, as directing them to that gap?

A. Well, they will naturally follow the creek bottom, and Nelson's fence would naturally act as a wing to catch cattle, and head them through that gap.

Q. Now, coming down to the opening called Opening No. 6, how wide is that Opening No. 6?

A. Oh, I didn't measure it, a quarter or half a mile wide, maybe wider.

The COURT.—(Q.) Half a mile wide?

A. I should judge a quarter or half a mile, I didn't measure it; quite an opening there, though. [280]

Q. Where do the cattle that are coming from the Humboldt country gather, or where do they come in with reference to the southerly side of this inclosure between these two creeks, Willow Creek with its extension of Siawappe, and Rock Creek with its extension to Toejam, where do the cattle come in from the south with reference to that land inclosed by those creeks?

Mr. PLATT.—I object to the question on the ground that witness has not testified that he has any knowledge as to what direction cattle come when they come from the south; and object further upon the ground that there is no distinction made between

(Testimony of S. G. Lamb.)

the fact as to whether the cattle were being driven in or wandering aimlessly in.

The COURT.—I will allow the question.

Mr. PLATT.—An exception, if the Court please.

A. The Bradley and Russell cattle always drift up on that side of Rock Creek.

Q. Rock Creek?

A. Up Rock Creek part of the way to Willow Creek, and follow that way.

Mr. PLATT.—(Q.) Up Rock Creek, where would you indicate that on the plat?

A. Rock Creek, and drift up through this country in this way (indicating).

Q. So I can understand that question: Do you mean Rock Creek as indicated on the plat?

A. Yes.

Q. Here is Rock Creek on the plat.

A. Rock Creek runs in down by 25, and the cattle drift up along, and hit Willow Creek.

Q. Drift up along Rock Creek and hit Willow Creek, and then where do they go?

A. Follow up Willow Creek, along through that neighborhood.

Q. I just wanted to understand your answer.

Mr. DENMAN.—(Q.) Let me ask you, what is the topography of the country, the shape of the country, with reference to its being [281] level or mountainous, to the south of Willow Creek?

Mr. PLATT.—I object on the ground that that land is not involved at all, and is without the inclosure.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—I want to show the drift of cattle This is without the inclosure; suppose there is high territory off in here, cattle would drift off that way to get in here; that is what I want to get at.

Mr. PLATT.—Do you admit that if there was high territory here the cattle would be turned, and drift in the other direction?

Mr. LEWERS.—Of course we do.

Mr. PLATT.—I would like the record to show that admission, if the Court please. I suppose that would be applicable to Toejam Mountain.

Mr. DENMAN.—No, there is feed in Toejam Mountain, and they go into the hills for the feed up there.

The COURT.—Do you still wish the question?

(The reporter reads the question.)

A. There is some very rough country down in here below the dam, and up in here (indicating).

Mr. PLATT.—I interpose the same objection.

The COURT.—It will be the same ruling and same exception.

Mr. DENMAN.—(Q.) You just pointed on the map to the reservoir here, and running across to the junction of the two creeks below.

A. Yes, sir, and down to the junction of the two creeks below.

Q. Where do the cattle drift as they come up in the spring-time, and as they are moving up into the higher country beyond, where would they come naturally?

Mr. PLATT.—I object on the ground that the

(Testimony of S. G. Lamb.)

question is too general; I don't know whether the high country beyond, or the witness knows, whether it means Toejam Mountain country, or the [282] country directly north of the plat.

Mr. DENMAN.—Of course that is testified to be level country by your witness Osborne, under your examination.

Mr. PLATT.—That has not anything to do with the testimony of this witness, or the legality of the questions being asked by counsel.

Mr. DENMAN.—I am following up my questions regarding the territory to the south of Willow Creek.

The COURT.—Read the question, please.

(The reporter reads the question.)

Mr. DENMAN.—That is with reference to the south line—

Mr. LEWERS.—In reference to Willow Creek.

Mr. DENMAN.—South line, or to the south of this blue strip here, on the south side of the map.

Mr. PLATT.—And of course the additional objection that it calls for the opinion of the witness.

The COURT.—Very well.

A. They would drag along this country here above this rough ground, and strike this open level country here, Hot Creek and up in Antelope, and where cattle drifts in that way.

Q. Where would they drift with reference to Opening No. 6, that you have just testified to?

A. They would naturally drift in about that country, cattle working up the spring of the year

(Testimony of S. G. Lamb.)

will follow a creek up, working up to the range, will follow the creek bottoms, and work up that way.

Q. What can you say with regard to the shape of the country around that opening, as to its being a valley, or mountainous, or what, right around this opening? A. Smooth ground.

Q. Is there anything around that smooth ground beyond it? What can you say with regard to that territory in there as a place [283] where cattle would or would not gather?

A. They would gather.

Q. What is there there; is there anything built in that neighborhood?

A. There is a fence above the gap and a fence below the gap.

Q. Anything else in that vicinity?

A. Sagebrush is about all.

A. Rodeo ground in there?

A. It is an old place for bunching cattle.

Q. As I understand your testimony, that is a point to which the cattle would naturally drift, and there is an old rodeo ground where they used to bunch the cattle in there?

A. Yes; I never bunched cattle right in that locality myself, we bunched up Siawappe Corral, most of our work, but it is understood as an old bunching ground.

Mr. PLATT.—It is understood my objection goes to all this.

Mr. DENMAN.—(Q.) Aside from that rodeo ground, what would you say as to the drift of cattle,

(Testimony of S. G. Lamb.)

would they drift up to that point?

A. Cattle naturally follow up a creek bottom, don't follow up a ridge.

Q. Are there any openings in this country that lead into that creek bottom? A. Which way?

Q. Coming up from the south.

A. There is a natural pass up in through there, nothing to stop cattle from going through there.

Q. There is a natural pass leading up to this opening? A. Yes.

Mr. LEWERS.—Make the record show where that is.

Mr. DENMAN.—That is from say a place marked "X" on the map, northerly? A. Yes, sir.

Q. Now, where is Antelope Creek from there, what direction or general direction? [284]

A. Antelope Creek is a little east of that.

Q. A little east? A. Yes.

Q. Where does Antelope Creek flow to; does it flow towards the Humboldt country, or back into the Willow Creek country?

A. Flows towards the Humboldt.

Q. What can you say with reference to Antelope Creek, as to the passage of cattle coming up from the south?

A. I never worked on Antelope Creek so much; the "25" boys always worked in there, we worked in above in that Squaw Valley country, in through there.

Mr. PLATT.—I don't know where Antelope Creek is in there, it is not depicted on the map.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—He says he has not worked in there. (Q.) You know about where it lays, don't you?

A. Yes.

Q. And you say the Russell boys worked over in there? A. Yes.

Mr. PLATT.—I ask that all this testimony be stricken out, the answer to the last question be stricken out, on the ground it is a leading question, incompetent, irrelevant and immaterial whether the Russell boys worked on Antelope Creek or not.

Mr. DENMAN.—He just said they had beforehand.

Mr. PLATT.—I ask that the answer be stricken out; I don't see what it has to do with this case.

Mr. DENMAN.—We will show later on; it is a matter of indifference whether it stays in or goes out.

The COURT.—If it is immaterial, it will go out then.

Mr. DENMAN.—At a later stage we will show it is material, and introduce further evidence. (Q.) Now, coming along this fence through Opening No. 7, 100 feet, and next to the word "Gate," what did you pass over, the county road there?

A. Yes, sir, that is supposed to be the road right up from [285] Willow Creek, I followed up there.

Q. How large is that gap where the road goes through?

Mr. PLATT.—It is a gate, as I understand it.

A. A lane through there.

(Testimony of S. G. Lamb.)

Mr. PLATT.—Marked “Gate” on the plat.

Mr. LEWERS.—I object to the interruptions unless they are in the form of objections.

Mr. PLATT.—Well, whatever it is, it is marked “Gate” on the plat; but whatever it is, I don’t care, I just want the truth, that is all.

Mr. LEWERS.—I object to the interruptions unless they are in the form of an objection addressed to the Court; an interruption to the witness, without addressing the Court with any objection.

Mr. DENMAN.—(Q.) How wide is that lane?

A. I don’t know; I measured, I can refer to a book.

Q. I just want general figures.

A. Somewhere 90 or 100 feet, I should judge.

Q. And what can you say as to the location of that gap with reference to cattle drifting up from the south towards the north in the springtime?

A. Why, it is right in line with everything drifting up from that creek, stock and everything drifting up from that creek.

Q. Now, I ask you with reference to this territory in here marked in white, inside the creeks, which we will call the Government land.

Mr. PLATT.—Well, you admit that it is, don’t you?

Mr. DENMAN.—Just let me finish my question. (Q.) What can you say as to the character of the feed in that territory?

A. There is some feed in that country early in the season.

(Testimony of S. G. Lamb.)

Q. How long does it last?

A. Well, the feed lasts there [286] longer than the water does; there is no water up in that country.

Q. About how long will the feed last?

A. Well, I suppose till June.

Q. Do you know whether or not any sheep lamb in this country?

A. Not to my knowledge; there may have been, but I never saw them in there.

Q. When was the last time you were in there, in June, May or June, how many years ago?

A. I think about 1902 or 1903 was the last time I was in there, that is in that time of year.

Q. How about April, is that true of April and March? A. No, I was not in there then.

Q. What can you say as to the character of the soil in the bottoms of these creeks, extending around from North's fence to the southerly, down to Toejam and Rock Creek?

A. The bottoms are good of both those creeks.

Q. What is the character of the soil?

A. Dark loamy soil.

Q. Good for agriculture? A. Yes, sir.

Q. Grow alfalfa?

A. Anything most, I guess, alfalfa and grain.

Q. And what can you say of the character of the soil when you get out of those bottoms?

A. Well, mountainous, rough; that is, it ain't farming land, grazing land would be all it would be.

Mr. PLATT.—(Q.) Do I understand you to say it was farming or grazing land?

(Testimony of S. G. Lamb.)

A. I said it was grazing land, not farming land.

Q. Grazing land? A. Yes, sir.

The COURT.—(Q.) Mr. Lamb, will you tell me again, I did not hear it, how wide the opening at No. 7 is, that is the last one you were asked about?

A. I should judge somewhere in the neighborhood of 100 feet. [287]

Mr. PLATT.—(Q.) That is where the road goes through, as I understand?

A. Yes, sir.

Mr. DENMAN.—(Q.) Now, for the purposes of the record, you made the statement that you had seen several thousand cattle up in this country?

A. Yes, sir.

Q. I ask you what you meant with regard to this country, with reference to the arrow at Opening No. 5?

A. Well, what I mean, I mean at the head of Rock Creek, and that country, and along the head of Toejam and Willow Creek and Siawappe, along that range of mountains along there.

Q. State with reference to this Opening No. 5 where these cattle went.

A. Up all through there; I seen cattle all along this range everywhere.

Q. I am asking you now with reference to the country northeasterly from that arrow?

A. I have seen cattle all through there everywhere; nowhere along there but what I have seen cattle all through that range.

Q. Now, with regard to the number of cattle you

(Testimony of S. G. Lamb.)

have seen to the northeasterly there, I don't want the exact number?

A. I could not say, only I have seen cattle all over there; as I told you 1889-1890 there was an awful lot of cattle in that country.

Q. And by "that country" you mean this country to the easterly of the red arrow? A. Yes, sir.

Q. Where do they range through there with reference to the land to the west?

A. Well, they ranged all over there, everywhere, there was no place but what there was cattle ranging in there. This man North, this fence was built in here to keep the cattle from drifting back in towards that valley.

Q. Towards this Government land?

A. Yes, sir, or any other place, Squaw Valley or any other place. [288]

Q. Now, we come in here to this opening, so-called, No. 1, what is that?

A. That is on Rock Creek; that is an opening we found there, wagon road runs through there; they told me it was a passageway for sheep.

Mr. PLATT.—I object to what was told him.

A. There is a passageway there.

Mr. DENMAN.—(Q.) Coming here to Opening No. 3, you found that there; or did you find any opening on this westerly line of fence, and about where, if you did; or is that where you came down the road?

A. Yes, I could locate myself on that map where I found a garden, right above this garden I found quite an opening.

(Testimony of S. G. Lamb.)

Q. Let me ask you about section 33 on Toejam with regard to opening.

Mr. PLATT.—What is the size of it?

Mr. DENMAN.—If he found any.

A. Well, I can't just locate myself with regard to the section, but all along this—is this on Rock Creek (indicating)?

Q. No, that is Toejam Creek; here is Rock Creek (indicates).

A. This is where the wagon road goes through; is that supposed to be the wagon road?

Q. No, that is the creek. A. This is the fence.

Q. Let me show you. The blue line is Toejam Creek, along here turns into Rock Creek, and comes down here to the left. Now, with regard to the fence as it is along Toejam Creek, did you find any opening there?

A. Yes, sir, I found an opening on Toejam Creek right above a little garden there, quite a large opening.

Q. About how large was it?

A. Oh, I could not state, probably 100 yards or so, maybe more or less, I could not say which, quite a big opening.

Q. And how about coming along further down, what other openings [289] did you find?

Mr. PLATT.—If the Court please, we have admitted all the openings on the plat. Our witnesses have testified to those openings; we don't admit, of course, some of them were there prior to the suit, but we do admit some of them were put there after

(Testimony of S. G. Lamb.)

the suit was brought.

Mr. DENMAN.—(Q.) Have you ever been in Gold Circle? A. Not since the town has been there.

Q. Do you know how far it is from this tract?

A. From this tract of land?

Q. Yes. A. To Gold Circle?

Q. Yes, do you know, as a matter of fact?

A. I don't know the miles, no, sir.

Mr. DENMAN.—I think that is all.

Cross-examination.

Mr. PLATT.—(Q.) When were you served with a subpoena in this case, Sheriff?

A. Served in this case?

Q. Yes, do you remember?

A. By the United States?

Q. Yes.

A. I can't remember just which day it was handed to me.

Q. Do you remember whether it was in February or March; this is the 8th of March, I think.

A. I kind of think it was in February, along about the 28th.

Q. Was it served after you got back from your examination? A. Yes, sir, just as I had got back.

Q. Who sent you out to take a look at the fences?

A. Who asked me to go out there?

Q. Yes.

A. Why, I could not say whether it was Mr. Petrie or—I think the notice I got was from Mr. Petrie first. [290]

Q. Who do you mean, the superintendent of the

(Testimony of S. G. Lamb.)

Golconda Cattle Company? A. Yes, sir.

Q. And they sent you out there with a view of examining the fences?

A. Going around that territory, yes, sir.

Q. And how long did you stay there?

A. I think we left Winnemucca the morning of the 26th, went up to Dutton.

Q. Who went with you?

A. Mr. Sheehan and Mr. Button went, I went from Winnemucca myself, and at Golconda we met Mr. Petrie, and I think Mr. Lewers.

Q. One of the counsel for the defendant?

A. Yes, sir.

Q. And how long did you stay up there?

A. We got up there about noon, went up around the fence to that gap at No. 1, on the 26th, came back the next morning, took the machine and went up Willow Creek.

Q. In the machine?

A. Yes, sir; up past the dam, up past that opening there, I forget just which one.

Q. No. 6.

A. Yes, that is the opening; on up above that, then took saddle-horses and followed along the creek to Siawappe Corral, around this country up here, down to North's fence, then on down to the Willow Corral on Rock Creek, and there we took the machine and came on back down.

Q. How long did it take you to make that circuit?

A. Around that field?

Q. Yes.

(Testimony of S. G. Lamb.)

A. I think we left, I would not be positive, I think we left that morning, we left Dutton about 7 o'clock, and I think we got around to the corral on Rock Creek—

Q. Where you started from, about?

A. No, we got around there, I think about 1:30.

Q. In the afternoon? A. Yes, sir.

Q. And then where did you go in the afternoon?

A. We went from there, followed on down the road, went on down [291] through Dutton, by Dutton on to Golconda, and from Golconda to Win-nemucca, that night, part of us did.

Q. As I understand it, you made the examination of the entire inclosure in one day, and got back to Golconda that night?

A. The fence, we made the examination of the fence and openings.

Q. Do you know about how long that fence is?

A. No, sir, I do not.

Q. Now, did you follow the main wagon road when you were in the automobile? A. Yes, sir.

Q. Stayed right in the machine, didn't you, until you took your saddle-horses?

A. Where them gaps was we got out and stepped across that gap there, right below the dam.

Q. By the way, you don't know when those gaps were built, do you? A. No, sir.

Q. You don't know whether they were put in after the suit was brought or before, do you? A. No.

Mr. DENMAN.—The testimony is, all that he has been examined on were put in before the suit.

(Testimony of S. G. Lamb.)

Mr. PLATT.—There is no such testimony from this witness.

Mr. DENMAN.—It is in evidence in the case.

Mr. PLATT.—I don't know about that, if the Court please. I think counsel is mistaken.

Q. Now, coming back to North's fence, you say part of that fence was down?

A. Quite a lot of it was down, yes, sir.

Q. You don't know who took it down, do you?

A. No, sir.

Q. You don't know when it was taken down, do you?

A. It wasn't taken down, it looked just like the—

Q. I don't care what it looks like, Sheriff. You don't know whether it was taken down, do you?

Mr. LEWERS.—I ask that the witness be permitted to explain the answer. [292]

The COURT.—(Q.) Did you wish to make any further explanation? A. Yes.

Mr. PLATT.—I asked if he knew whether the fence had been taken down, and I think I am entitled to an answer to that question before he is permitted to explain.

The COURT.—Ask the question.

Mr. PLATT.—(Q.) I asked you whether you knew if that North's fence, or any part of it, had been taken down? A. No, I do not.

The COURT.—Now, explain your answer.

A. It looked like the staples just fell out of it, and the wire fell down on the ground.

Mr. PLATT.—(Q.) That is what it looked like?

(Testimony of S. G. Lamb.)

A. That was the condition it was in.

Q. You don't know whether the staples had been pulled by anybody, and the wires taken off the posts, do you? A. No.

Q. Did you see any wires on the ground?

A. Lots of it.

Q. The wires running on the ground, as if the fence had toppled over itself? A. Looked that way.

Q. The wires were laying on the ground?

A. And many of them, what had not been broke was coiled up, and broke in different places; looked like an animal had probably stepped through, and got it on its foot, and broke it, or something might have moved it.

Q. It looked like it might have been moved by an animal or somebody?

A. That is the way it looked, something had moved it.

Q. You don't know whether that fence was in that condition or not, when this case was reported, do you? A. No, sir.

Q. Or when this case was brought?

A. I don't know when the case was brought.

Q. You are just testifying to what you saw upon that trip, as I understand it? A. Yes, sir. [293]

Q. Now, you testified it was natural for cattle, as I understand it, to follow up the creek bottoms, or along the sides of the creeks?

A. Yes, sir, that is natural for cattle, working up in the spring of the year, and in the fall going back, they continue down the creeks and things.

(Testimony of S. G. Lamb.)

Q. Did you ever see any cattle starting in to work up Rock Creek and Willow Creek, and beginning somewhere at their confluence, down at the southwest corner of this plat?

A. No. I can explain. I didn't work in so much south, or down that Rock Creek where it went into the gorge and Willow Creek came in, that was on the Bradley and Russell range, that was a dividing range between their ranch and our ranch; I worked Squaw Valley, and kept along that country with my wagon to the Siawappe Corral, I would leave my wagon at the Willow Corral in Willow Creek, and then I would cross over there to Siawappe, and punch, and Russell would have his wagon there, and we would work our cattle; they went towards Battle Mountain with their cattle, and we went towards Golconda.

Q. Your work was more properly on the eastern side of this plat, as I understand it?

A. Up Willow Creek, Toejam, Siawappe, Scraper Springs, and into the head of Rock Creek from there.

Q. Now, Sheriff Lamb, if cattle should work their way along Willow Creek, beginning about at a point between the junction of Rock and Willow Creek, would it not be natural for them to follow along the creek-bed, as you say?

A. Not for a ways there, it is very rocky.

Q. Where is it rocky?

A. Up where the creek goes into the canyon, that is the fork of Rock Creek, where it runs down into what they call the gorge.

Q. Is that gorge within any territory represented

(Testimony of S. G. Lamb.)

upon the map? [294] It is way down further southwest, is it not? A. Yes, it is further south.

The COURT.—(Q.) It is below the junction?

A. Yes, sir, it is below the junction.

Q. (Mr. PLATT.) Suppose the cattle started to work their way north or northeasterly, and started at a point represented by the extreme southwestern corner of this plat, would it be natural for them to work their way along from Rock or Willow Creek?

A. There ain't many cattle comes in that way; it would be natural if they were in that way to work up the creek; where cattle can't work up a creek on account of rocks and things, they will follow around.

Q. Cattle starting there, would it not be natural for them to work their way up along these creeks?

A. It is natural for them to work their way up along the creeks, yes, sir.

Q. Have you ever seen any cattle start to working their way up the creek, beginning at a point known as Ivanhoe Creek? A. Ivanhood.

Q. It is "Ivanhoe" on this plat.

A. I don't know it by that name, I know where it comes in.

Q. Any creek relatively in the same position as Ivanhoe Creek? A. I can't say that I have.

Q. You don't know. Are you familiar with that country there?

A. Not that far down, not down that far; no, I am more familiar above the lake, and along that country in through there, and up Rock Creek, and that way.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—(Q.) By the “lake” you mean the reservoir?

A. Yes.

Mr. PLATT.—(Q.) You don’t know then, Sheriff, do you, whether as a matter of fact, that is, from actual experience and knowledge, it would be natural for cattle to gather at any point below [295] or west of Opening No. 6?

A. I know that is a natural place there; it always was; we worked in that country there; that was a rough country down in there, didn’t come in much with cattle; cattle couldn’t water in that country, and didn’t stop down in that country much; they would come in Siawappe Corral, work that way, and come in from Rock Creek, and bunch in there.

Q. You know that section of country in the neighborhood of Opening No. 6, was a natural place for cattle, you testified to that? A. Yes.

Q. But you don’t say there were any points west of there that were not natural places for cattle to come in; that is, from your knowledge and experience, and without guesswork?

A. No, above the dam there is some natural passes, but below the dam I don’t know.

Q. You don’t know, do you?

A. No, I am not positive of that country that low down there; it is rough in there and we didn’t work in there.

Q. You didn’t work in there? A. No, sir.

Q. Do you know anything about the country through which Rock Creek flows? A. Yes, sir.

(Testimony of S. G. Lamb.)

Q. All this western border? A. Yes, sir.

Q. Were there any natural places along here, along this western border, for cattle to congregate, and work their way through toward the east?

A. They could go through there anywhere.

Q. Anywhere? A. Yes.

Q. As I understand it, if cattle were wandering aimlessly, or being driven or herded, it was perfectly logical, natural and easy for them to have crossed this Government land within the inclosure, if they had gone through any place along the west line of that inclosure?

A. Yes, sir, they could have gone across there anywhere. [296]

Q. There is no question about that, is there?

A. No, sir, I don't think so, not that I know of.

Q. Now, suppose, Sheriff, that this western side of this Government tract were completely fenced in, what would be the natural course of cattle, in the event they were herded or grazed from the west, and were being driven toward the east, where would they go?

A. Cattle always from that side work up towards the Scraper Spring country, and up in that way.

Q. Where is that? A. It is off to the north.

Q. Is it on the plat? A. No.

Q. I am not calling your attention to anything that is not visible on the plat.

A. I don't think cattle would work across that.

Q. I ask you the question, Sheriff, you stated anywhere along the western border of this plat would be

(Testimony of S. G. Lamb.)

a natural and logical place for cattle to go through toward the east?

A. They could if any cattle drifted in that way; they could go in that way anywhere.

Q. Now, assuming that there were a bunch of cattle, say at a point marked 21 upon the western extremity of the plat, and somebody was driving them, and it was the intention of the person to drive them across this inclosure so that they might graze within this Government land, and they were stopped by an obstruction known as a fence, and could not get through, would it not be necessary for those cattle to be driven along the line of fence until some opening might be found so that they could be driven through?

A. I expect they would have to; if he was driving along the fence he would have to find an opening to get them in.

Q. Have to find an opening to get them in?

A. Yes, sir.

Q. Then as I understand it, if anybody owning cattle or sheep were driving them from the west toward the east, and ran up to [297] any place or point along the west side of this plat, and did not find an opening, it would be necessary for him to go around the inclosure until he found an opening to get into, would it not? A. I expect so.

Q. You would do that if you were a cattle driver, wouldn't you?

A. No, I would drive to where those gates were put in, I would know where I was going; I would not be going at random; if I was going up against that field

(Testimony of S. G. Lamb.)

with a bunch of cattle, I would know where an opening was before I hit it.

Q. Suppose you were a stranger in the country and were driving cattle across there?

A. I don't know, I never was in that fix exactly. Of course I have butted up against fences different times. In 1889 when I went in that country I went in with a big band of cattle, went up against Noble's fence, didn't strike no gate, simply found a little sag, raised up two or three wires, took the cattle under, and put the fence up, and went on.

Q. You took the fence down so the cattle could get through? A. Yes, sir.

Q. Did you in your experience upon the ranch ever know of any cattle or sheep being driven from the west toward the east into this inclosure represented by the Government lands? A. No, sir.

Q. In all your experience you have never seen any?

A. No.

Q. Had you ever seen any being driven from the north? A. Yes.

Q. Whose cattle were they?

A. Golconda Company's cattle.

Q. Did you ever see anybody else's?

A. I have seen Noble's and old man North's, Russell's; they drove from Siawappe down that way; we would take ours the other way; we always split up there, either at Willow Creek or Siawappe.

Q. Did you ever see any cattle or sheep grazing upon the land represented upon the plat as Government land, and within that so-called inclosure?

(Testimony of S. G. Lamb.)

A. I have seen cattle in there, yes, sir. [298]

Q. Whose cattle?

A. Bradley's, Russell's, Golconda Cattle Company, P. Bench, Palo Alto; different outfits, could not say all. That is when I was working in that country, I saw none the other day.

Q. You saw them grazing on this Government land, didn't you? A. Land in that territory, yes, sir.

Q. And away from the creeks, didn't you?

A. Not in the summer-time, not very far away.

Q. Winter-time?

A. I didn't stay there in the winter; sometimes early in the spring of the year I saw cattle in there.

Q. Early in the spring of the year you saw cattle grazing years ago in there?

A. Along the creeks, not very far out; it is a dry territory in there, outside of the creeks.

Q. Do you say in the spring this is not good grazing land?

A. It is very good grazing land in the spring of the year.

Q. Now, you say it is a natural way for cattle to drift northerly from this southern gap, No. 6; I ask you if it is not a natural way for cattle to graze south from a point Opening B., or from a point Opening No. 4, or east from a point Opening No. 3, or from a point Opening No. 1?

Mr. DENMAN.—You mean across the Government territory?

Mr. PLATT.—Yes.

A. Well, you see when cattle gets up in that high

(Testimony of S. G. Lamb.)

country the snow is all gone, the cattle naturally would not drift back to that dry country any time; cattle leaving that high range in that time of the year, they are drifting straight back to the Humboldt River.

Q. Where is the Humboldt River relative to that plat? A. It is southwest.

Q. Southwest of the plat?

A. West and southwest.

Q. Do you know how many miles it is, Sheriff, from that southwest [299] corner of this plat to Opening No. 6? A. No, I don't know that.

Q. You testified that you knew that North's fence was built for the purpose of keeping cattle from grazing upon this Government land?

A. No, to keep them from drifting down into that country.

Q. What do you mean by to keep them from drifting down into that country?

A. That country down there was dry along Rock Creek, and cattle drifted down in there, so he built that for a steer field, and there is no fence on the north part of that, there was no fence up there, just a kind of a drift fence, and he used to put his cattle up there, and keep them on good feed, and keep them salted, because it was watered, and a good place for steers, he built that for that purpose.

Q. Was it natural for the cattle to drift down this Government land?

A. Follow down Rock Creek, and water is scarce there, and drift back in towards the Humboldt River.

(Testimony of S. G. Lamb.)

Q. So he put up this fence to keep them from drifting that way? A. Used it for a steer field.

Q. You know that of your own knowledge, do you?

A. Yes, sir.

Q. What is the general trend or slope of the country and tendency of the country as to elevation, beginning from the southwest corner of the plat, up to and extending to a place marked "Toejam Mountain"?

A. Well, it is a pretty gradual raise from there all the way up, one side slopes off towards Rock Creek, the other side slopes towards Toejam and Siawappe country.

Q. But it continues to rise, does it not?

A. Yes, sir.

Q. Do you know who owns this land indicated in the blue near the Toejam Mountain? A. No, sir.

Q. What is on the other side of Toejam Mountain, do you know?

A. Range, just about the same as on that side, on the other side [300] of the slope.

Q. Is it a private range or public range?

A. I don't know.

Q. You don't know? A. No, sir.

Q. Do you know whether it is Government land or private land? A. No, sir.

Mr. PLATT.—I think that is all.

Redirect Examination.

Mr. DENMAN.—(Q.) Sheriff, you were asked about ranging cattle on the west side; I didn't ask about that but Mr. Platt did. What is the general

(Testimony of S. G. Lamb.)

direction in which cattle range on the west side of this fence; where do they go to?

A. They range up in that Scrapper Spring country, and up in the high ranges, and over towards Oregon Canyon, towards that way.

Q. North and northwesterly direction? A. Yes.

Q. Cattle in this high country, you said they return down Rock Creek and Toejam? A. Yes.

Q. Do they come across Rock Creek and come onto the Government territory, when they are returning in the fall?

A. No, generally string right down the creek bottoms.

Q. What is the reason?

A. On account of the water and trails along them springs, is why they follow them down.

Q. That is along the general blue line?

A. They follow the creek bottom, yes, sir.

Q. I am talking about this space of 40's, you see.

A. Yes.

Q. Along that blue line, down in a general westerly and southwesterly direction?

A. Yes, sir, that is the way cattle come.

Q. I understood you to say no cattle were worked from west, east, to try to get onto this Government land? [301]

A. Why, no, I never knew of cattle worked that way; they always worked the other way, they worked north, instead of working down into that country. There was a hot spring up there, used to be a few cattle hung around that in the summer-time, on Rock Creek.

(Testimony of S. G. Lamb.)

Q. It is on the land of the Company, is it not?

A. It is in there right close, I don't know the number of the section, I know where the spring is.

Q. It is on the Company's land, is it not?

A. I don't know, only one spring there, a big spring.

Q. Well, we will determine that later on. When you said cattle coming from this north country started back to the Humboldt, you referred to starting down the creek?

A. They would probably come down there about to where we call Dutton now, outside there, then take and cross over to Spring Creek, then on down to Summit Creek, then down to Humboldt.

Q. Coming down this side where would cattle go?

A. On this easterly side, they don't follow down—there is a few might follow down and go into the canyon below Squaw Valley house.

Q. That is to say the canyon on Rock Creek to the southwesterly of this map?

A. Come from the gorge and go toward Eisner.

Q. What would you say as to the proportion of cattle coming from the north and the proportion going easterly towards Antelope Creek?

A. The bulk go towards Antelope Creek, natural way for them to go over that way.

Q. That is true about coming up the same way?

A. I should think it would be; I didn't work in that Antelope country, it was out of our country to follow that country down to work; that is the Bradley and Russell range.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—If the Court please, my associate is more familiar with this topography to the extreme south than I am, and I would like to have the rule waived, and ask that he examine the witness [302] further on this point.

The COURT.—Very well.

Mr. LEWERS.—(Q.) Mr. Lamb, are you familiar with the lower end of Squaw Valley, below the Lake field? A. Yes, sir.

Q. State what is the character of the mountain, if there is any down there.

A. There is a big gorge down through that canyon, and big rim-rock on each side.

Q. Is that the gorge to which you have referred, through which Rock Creek runs? A. Yes, sir.

Q. How high is that rim-rock down there at the lower end of that ranch, approximately?

A. Oh, I don't know, it must be 3 or 4 or 5 hundred feet in some places, it is very high, or more.

Q. A precipice, you mean? A. Yes, sir.

Q. And does that extend around to the south of the Dutton house? A. Yes, sir.

Q. And how far does it extend toward the east, toward Ivanhoe Creek?

A. Well, it extends along up there, pretty well along up that bluff, towards the lake quite a ways, I could not say just how far it continued up there, a solid bluff, though, of course there is breaks in it; it is a very rough mountain on there.

Q. By towards the lake, you mean the artificial reservoir on Willow Creek? A. Yes.

(Testimony of S. G. Lamb.)

Q. Is that the high mountain that you have referred to as being the one below which, or to the south of which cattle are driven, and which come in up toward the reservoir? A. Yes, sir.

Q. Now from what country do those cattle come?

A. They come from down the Bradley and Russell country, towards Battle Mountain, "25" ranch.

Mr. PLATT.—Do you testify they come from there now, or do you testify that you know they came from there 15 years ago? [303]

A. I know the same firm is there yet, and I know that is their range that they run cattle in, that is at the present time, that is all I know about it.

Mr. LEWERS.—I prefer not to be interrupted, unless there is an objection to the question.

Mr. PLATT.—I was asking the question to lay the foundation for a question. I am asking as to whether the witness is testifying to his knowledge 15 years ago, or present knowledge from present conditions.

The COURT.—Well, if you have an objection you can make it.

Mr. PLATT.—I move that the answer be stricken out, and I interpose an objection to the question on the ground that the question is too indefinite, not being directed to any knowledge which the witness had at the time this suit was brought, or any reasonable time prior thereto.

The COURT.—I will overrule that objection. You can cross-examine him as to that.

Mr. PLATT.—I ask for an exception on the grounds stated in the objection.

(Testimony of S. G. Lamb.)

Mr. LEWERS.—(Q.) Now, going in the other direction, state whether or not that high precipice, or barrier, or mountain that you say is to the southwest of the Dutton Ranch extends over to any extent toward Golconda.

A. Southwest of the Dutton Ranch.

Mr. PLATT.—I object to the question on the ground it is leading.

Objection sustained.

Mr. LEWERS.—(Q.) What direction does it extend? A. It is southeast of the Dutton Ranch.

Q. And do you know where the road or roads, whatever there may be, from Golconda come into the Squaw Valley? A. Yes. [304]

Q. How many roads are there?

A. Comes into Squaw Valley?

Q. Yes.

A. Two from Golconda; one comes in by Spring Creek, and the other comes in by what they call the Indian Springs.

Q. State whether or not those roads come together at any place. A. They do.

Q. Where?

A. Right close to the Dutton house on the outside of the fence there.

Q. And after they come together does the road when united come onto this plat shown in Government's Exhibit No. 1?

Mr. PLATT.—I don't want to keep interposing objections all the time, it seems to me that is another manifestly leading question.

(Testimony of S. G. Lamb.)

Mr. LEWERS.—State whether or not it does; it is only preliminary. You don't deny it, I suppose.

The COURT.—I don't know the purpose of this.

Mr. LEWERS.—Merely for the purpose of showing the connection between the road that goes through there, and that territory to the west.

Mr. PLATT.—I think, your Honor, it is a leading question.

Mr. LEWERS.—I withdraw the question.

Q. Mr. Lamb, are you familiar with any road leading through this plat? A. Yes, sir.

Q. What road is that?

Mr. PLATT.—I object on the ground it is improper redirect examination; it is not based upon any questions asked in the cross-examination.

The COURT.—I will permit this.

A. There is three different ways or four you could get in there.

Mr. LEWERS.—(Q.) The question is, what road is that?

A. That is the road, that is one of the roads that come in from [305] Golconda, you can follow right in from Golconda, and go in through there, follow up Toejam and go in that way, or go in by the Dutton place; you can continue up Rock Creek two or three different roads, you can follow in.

Q. In coming in over the roads you have mentioned from Golconda, what portion of the Squaw Valley Ranch shown on this plat would you strike in traveling with a team or automobile? Do you understand the question?

(Testimony of S. G. Lamb.)

A. I don't exactly. Which part would you strike?

Q. Yes, by this plat; where would you come in to the land shown on this plat in travelling by team from Golconda?

Mr. DENMAN.—The regular travelled route.

A. Where would you come; you mean where you would come in at the house?

Mr. LEWERS.—(Q.) No, where would you strike the territory shown on this plat?

A. Strike it there at that Opening No. 1.

The COURT.—What is the point to which this testimony is directed?

Mr. LEWERS.—That the natural course of travel into this country is through this opening. That is, that the public roads from the various places converge onto this public road.

Mr. PLATT.—I will admit, if the Court please, a person travelling in a buggy or automobile would not travel on anything but a public road; I think it must be preferable to travelling through the sagebrush; I think that is quite manifest.

Mr. LEWERS.—That is not what we are trying to prove.

Mr. PLATT.—I cannot see how it is material to any issue. Sheep or cattle are not driven across roads usually.

The COURT.—Is it the ultimate purpose of this testimony to prove that the fence down at the southwest corner of that tract is not an obstruction, because no cattle, or no person seeking [306] to cross that territory would ever go there?

(Testimony of S. G. Lamb.)

Mr. LEWERS.—No; that no person seeking to come into this territory would ever go anywhere except through that lane, that is the point.

The COURT.—How about cattle wandering over the range?

Mr. LEWERS.—I am first taking up the question of homesteaders moving their paraphernalia in there.

Mr. PLATT.—I will admit the homesteader could jump the fence and could take a look, for that matter, but I do not see how that is material to the issues here. The material to homesteaders is when a homesteader comes to that field, and takes a look and sees the field is inclosed, he says to himself somebody else owns that, there is no chance for me to get in there.

The COURT.—I am going to let this in, if you have a point in it. I don't really see the materiality of it. I am not deciding it at all. I am going to let you put it in, but it will go in subject to Mr. Platt's objection, and will be considered later the same as other testimony. You have evidently prepared yourself for that line of examination because you believe it had a bearing on this case, and I prefer that you get it in; but I simply asked that question because I wanted to know in advance what you were directing the testimony, to what point you contend it is material.

Mr. LEWERS.—I will illustrate by this, that the purpose of this testimony, together with other testimony which we have introduced and will introduce, is to show that approaching that country from any bearing or possible angle permitted by the surrounding country, will lead you right into that without any

(Testimony of S. G. Lamb.)

obstruction. That is the purpose.

Q. Now, Mr. Lamb, do you know where the road is that runs up to Midas or Gold Circle?

A. Yes, sir. [307]

The COURT.—I presume Mr. Platt will admit considerable of that.

Mr. PLATT.—I will admit all the county roads.

The COURT.—What the natural lines of travel into that territory are.

Mr. PLATT.—I have never been over them, and I don't think I have been over this one, but for the purposes of the case I am willing to admit all the county and public roads in that neighborhood, if it will save any time.

Mr. LEWERS.—Will you admit that the road from Midas or Gold Circle and the road from Golconda, and the road from Battle Mountain, all converge and come into the public road which leads through Opening No. 1?

Mr. PLATT.—No, I won't admit that they all converge, but I will admit this, that anybody who is going or coming from one of the points mentioned by counsel, and going to Midas, that he will find a road from the point of the starting of his journey, which will connect with the road to Midas, and that main road to Midas is the main road depicted on that plat; but I will not admit all those roads converge into that road, because I don't think they do.

Mr. LEWERS.—I will state again, and perhaps you will concede it, that the road leading from Winemucca and that from Golconda and that from

(Testimony of S. G. Lamb.)

Battle Mountain, and also the road leading from Midas or Gold Circle toward the east, all come together onto the public road, passing through Opening No. 1.

Mr. PLATT.—Let me understand you, do you contend that each one of these separate roads all come together at one point?

Mr. LEWERS.—No.

Mr. DENMAN.—Will you concede the shortest travelled route from Golconda to Tuscarora, from Winnemucca to Tuscarora and from Midas [308] to Tuscarora, and from Battle Mountain to Tuscarora, is through Squaw Valley, and through this lane, No. 1?

Mr. PLATT.—Well, for the purposes of this case, I see no objection to admitting that. I don't see anything material about it.

Mr. DENMAN.—We simply want to show the travelled routes.

Mr. PLATT.—That is a different proposition from all roads converging in that other road.

Mr. LEWERS.—That is all.

The COURT.—(Q.) Mr. Lamb, I would like to ask a little more about that North fence, how long is it? A. That North fence?

Q. Yes.

A. You mean the old fence that belongs to North?

Q. Yes, the one you were talking about.

A. I can't say how many miles it is; it follows up Rock Creek, runs up there, and it quits there, when I was there, no end to it; then follows the other way

(Testimony of S. G. Lamb.)

to Toejam, and then to the head of them Toejam Mountains, and that north part when I worked in there was vacant, or so anything could go east in that country, no fence across Rock Creek in my time working in there, or back of the Walker place; cattle could go up that way anywhere they wanted to, nothing to stop them. That fence on the lower end towards Squaw Valley, just a fence old man North put there to keep anything from drifting down.

Q. About how long was that fence?

A. That fence, 10 or 12 miles long, maybe more.

Q. Is it still 10 or 12 miles long?

A. Could not say, haven't been around it, for certain.

Q. Is it a straight fence?

A. No, sir, kind of runs from north to south, and follows Rock Creek, then runs an easterly direction.

[309]

Q. Not an inclosure, but simply to keep cattle from drifting?

A. Not in my time; not an inclosure.

Q. You say you found the wires down; how many wires were there on the fence originally?

A. I believe there was four.

Q. Were the wires all down?

A. In these places?

Q. Yes. A. Yes, sir; all of them down.

Q. How wide a space were they down?

A. Oh, spaces there probably a block long, some more.

Q. What kind of a block?

(Testimony of S. G. Lamb.)

A. What we call a block in the street, probably 300 or 400 feet, in places it was all down.

Q. Then spaces for how long where the fence was up?

A. Some places probably be a quarter of a mile, half a mile, maybe a mile some places, I would not say a mile. It seemed to me there was as much fence down as there was up; it seemed to be in pretty bad condition.

Q. Were the posts down? A. On the ground?

Q. Yes.

A. No, most of the posts was up, sometimes posts were down; most of the posts were standing up.

Q. Where you found the openings for a block, were the wires entirely down, or were some of the wires on at one post, and down on the next?

A. The biggest part of them down on the ground.

Q. They were taken down clean?

A. Most of the places they were clear down.

Q. Did you see many places where they were not clear down, where one wire would be up?

A. Yes, sir; some places.

Q. Be on one post, and down on the posts on each side of it? A. Yes.

Q. Did you see any where the upper wire was still on?

A. Well, I could not just remember whether I took particular notice of that; but I took more notice of where they was down entirely, and the conditions of the fence, and I would not be [310] positive whether I saw a place where there was a top wire and

(Testimony of S. G. Lamb.)

two down, I would not be sure.

Q. Did you see any place where there was anything to indicate that the wires had been pulled down?

A. No, I could not say I could.

Q. Did you see anything more there than you have already given us that would indicate that the wires fell of their own weight? A. No, I could not.

The COURT.—That is all.

Mr. LEWERS.—(Q.) In that connection: What was the condition of the wire, Mr. Lamb?

A. The condition of the wire?

Q. Yes. A. In what respect do you mean?

Q. Well, as to its being new or old, what condition was it in? A. It was old wire.

The COURT.—He has testified it was old wire, and rusted.

A. I knew the fence there myself in 1889, and the fence that was there when I went through there in 1889, the same fence, when I worked there; I don't think at that time, though, it was a very old fence.

Mr. LEWERS.—That is all.

Mr. PLATT.—No questions, if the Court please.

[311]

Testimony of George Russell, Jr., for the Defendant.

GEORGE RUSSELL, Jr., called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. What is your full name, Mr. Russell?

A. George Russell, Jr.

(Testimony of George Russell, Jr.)

Q. Where do you live? A. Elko, Nevada.

Q. How long have you lived there?

A. Well, for about 32 years.

Q. You were born there, weren't you?

A. Yes, sir.

Q. What is your business? A. Stock business.

Q. How long have you been in the stock business?

A. Well, I have been engaged in that since 1899.

Q. Since 1899? A. Yes, sir.

Q. Some 12 or 13 years? A. Yes.

Q. Are you familiar with the country inclosed by Willow Creek and Siawappe on the south, and Rock Creek and Toejam on the north? A. Yes.

Q. How long have you been familiar with that country?

A. 1896 was the first time I was there, I believe.

Q. Been going there ever since? A. Yes.

Q. What interests have you there in that country, if any?

A. The corporation I am interested in owns land there in that vicinity, and run cattle and horses.

Q. Are you familiar with the territory extending from the junction of Willow Creek and Rock Creek, along Willow Creek up Siawappe to Toejam Mountain country? A. Yes.

Q. Worked cattle in through that country?

A. Yes.

Q. Let me ask you what the character of the land is with reference to elevation, or roughness, or smoothness, south of Willow [312] Creek from its junction with Rock Creek, and extending over to the

(Testimony of George Russell, Jr.)

neighborhood of the reservoir?

A. Well, there is a large mountain that extends from the dam, opposite the dam, which would be south, to the pass, what they call Butte Creek, where Butte Creek intercepts Willow Creek, a few miles north of the junction of Rock Creek and Willow Creek.

Q. Are you familiar with the movement of cattle from the south toward Willow Creek country?

A. Yes.

Q. Can you tell where cattle naturally pass coming up in the spring-time, with reference to where they would strike the south boundary of this blue inclosed territory here?

Mr. PLATT.—For the purpose of preserving the record, I object to the question on the ground it calls for a conclusion of the witness or opinion of the witness. I ask the same ruling and exception may be noted.

The COURT.—Yes. You might just as well qualify this witness to show that he does know that country.

Mr. DENMAN.—(Q.) You worked all through this country here? A. Yes.

Q. Worked cattle in there many years?

A. Yes.

Q. I thought I had put that question.

The COURT.—Perhaps you had, but it escaped my memory.

Mr. PLATT.—I objected to the question on the ground it called for the opinion or conclusion of the

(Testimony of George Russell, Jr.)

witness as to the natural tendencies of cattle to graze in certain directions.

The COURT.—Same ruling and exception.

Mr. DENMAN.—(Q.) Answer.

A. Well, there are two ways; one way they go up Willow Creek, and another way they go out through what we call the Hot Creek Pass. [313]

Q. Relatively as to the number, which route is followed by the greater number of cattle?

A. Well, I should judge, through the Hot Creek Pass.

Q. Where would that bring them on this map with reference to Opening No. 6?

A. Well, they would pass down over what we call the Hot Creek rodeo ground, over Hot Creek, and strike Willow Creek on the rodeo ground we have there, where the Russell Land and Cattle Company own a couple of 40's on the creek there.

Q. Is that the natural pass for them coming through there?

A. That is practically the natural way.

Q. When driving cattle in that country, where would you bring them to when you desired to take them into this northern country?

A. We generally bunched them at that rodeo ground on those two 40's, I forget what the description of that land is.

Q. Now, let me ask you with reference to that turn, the creek, where it is with reference to the creek where Willow Creek turns north?

A. I judge it would be a mile south.

(Testimony of George Russell, Jr.)

Q. Do you know of any opening in that fence there? A. Yes.

Q. Where with reference to the opening?

A. That opening in the fence bounds those two 40's.

Q. How wide is that opening?

A. I should judge it is about a half mile.

Q. Now, you say that in driving cattle through this country up Willow Creek or elsewhere, that you drive to reach that rodeo ground, is that correct?

A. Yes.

Q. And from there you turn the cattle loose?

A. Yes, sir.

Q. Now, do you know where the county road crosses there? A. Crosses the creek?

Q. No, do you know where it crosses the fence?

A. Yes, sir, I know about where it does. [314]

Q. What can you say with reference to that being an opening that would be availed of or not by cattle coming up from the south in this direction?

Mr. PLATT.—Same objection, on the ground it calls for an opinion or conclusion of the witness.

The COURT.—Same ruling, and same exception.

A. Why, cattle coming up along the creek there, I should judge, could go through there all right in that opening, as I saw it last year, last July it was.

Q. Were you in that country in the spring of last year? A. Yes, sir.

Q. When, along in April or May?

Mr. PLATT.—I think we have had enough leading questions, if the Court please.

(Testimony of George Russell, Jr.)

Mr. DENMAN.—(Q.) Well, at what time?

A. The latter part of June.

Q. Were you in this territory in here? (Indicates on plat.) A. I was.

Q. See any cattle in there? A. I did.

Q. What brands did you see in there at that time?

A. I saw cattle branded with the "25," with the pitchfork, and I saw some Tuscarora cattle in there belonging to Mr. Fairchilds, and some of those other ranchers, a few.

Q. How many brands altogether did you see?

A. Well, I saw, I think, probably 5 or 6 brands; something like that.

Mr. PLATT.—In there, you mean on the Government land?

A. Yes, sir; I don't know whether it is entirely Government land, but within that space there between Rock Creek and Willow Creek.

Q. (Mr. DENMAN.) You say you don't know about the Government land; [315] where is the natural place for them to travel as between the creeks in this sagebrush upland here, where is the natural place for the cattle to travel, moving north?

Same objection, ruling and exception.

A. It is always natural for cattle to follow the creeks.

Q. Now, coming along this fence up Toejam Creek to a point marked "Opening No. A," state whether or not that would be a natural pass for cattle to enter going in toward the Toejam Mountain?

A. Yes, sir, that is where we drift cattle.

(Testimony of George Russell, Jr.)

Q. And how long has that been the custom?

A. Well, ever since I have been in that country, since 1896.

Q. Now do you know North's or Noble's fence up here? A. Yes.

Q. How long have you known it?

A. Since 1896.

Q. What can you say as to the condition of that fence during the last three years?

A. As I remember the fence, it was a three-wire fence, and I was there three years ago, and it seemed to be in fairly good condition. Last June when I was there the fence was down.

Q. Last June? A. Yes, sir.

Q. Do you know how long it had been down at that time, can you tell? A. No, sir, I could not tell.

Q. What was the condition of the wires?

A. Well, the wires in places were lying on the ground, and the posts broken off; and other places the staples would be out, same as if it were not kept up.

Q. Seem as though they had been pulled out, or gradually worked out from disuse?

A. I should judge they had worked out from disuse.

Q. Were you there in May of last year?

A. No, sir, I don't believe I was, I was there in June.

Q. Now this country here, from this so-called Opening A, running [316] up to the northeasterly through this long snakey looking thing called Toejam

(Testimony of George Russell, Jr.)

Mountain, and to the east of that 2½ miles, are you familiar with that territory? A. Yes, sir, I am.

Q. What can you say as to the character of that territory, with reference to its passability for stock?

Same objection, ruling and exception.

Mr. PLATT.—That is not testifying to the facts, but giving his opinion.

Mr. DENMAN.—I want the facts with reference to the condition of the country with reference to the passability of stock.

A. Well, it is a large mountain on the south and east side, and there are trails going over the side of the mountain down into the creek.

Q. What can you say as to the character of the feed in there?

A. Well, there is generally very good feed in there.

Q. Is it a natural passageway for cattle?

A. Yes.

Q. How long has it been there?

A. I don't know how long.

Q. Well, as long as you can recollect the cattle have gone through there? A. Yes, sir.

Q. How wide a territory is there between Opening No. A, and North's fence through which cattle can pass northeast?

A. I don't know exactly where Opening No. A would be there, because I never saw a map of that country; that is, I was never there with a surveyor.

Q. Do you know where that clump of trees is?

A. Yes.

Q. You know where Noble's fence is? A. Yes.

(Testimony of George Russell, Jr.)

Q. Do you know where the end of the Golconda Cattle Company's fence is? A. Yes.

Q. Well, that is Opening A.

Mr. LEWERS.—You will admit, will you, that that opening is [317] by that clump of cottonwoods?

Mr. PLATT.—I don't know.

Mr. DENMAN.—(Q.) Now, let me ask you: do you know where the quaking asps and the spring is, westerly of Opening A? A. Yes.

Q. And you know that gap between the Golconda Cattle Company's fence and Nelson's fence?

A. Yes.

Q. Is that the opening you testified to as being a natural pass for cattle going through there?

A. Yes, sir, cattle would go up that way.

Mr. PLATT.—That is not the opening to which he testified. Counsel directed his attention to Gap No. 6, I think it was, down here.

The COURT.—Well, more recently he understood he was talking about this Opening A, at the end of the Golconda fence.

Mr. PLATT.—He is now; but the witness did not testify as to that being a natural place for cattle; he was not asked that question about this gap.

The COURT.—He told about this point down below being a natural gathering place, as I recollect.

Mr. DENMAN.—I have a keen recollection I asked him also about this gap here, and he testified that was a natural place where cattle would naturally pass coming from the south of Nelson's fence, and

(Testimony of George Russell, Jr.)

working to the north.

The COURT.—Perhaps that was testified when he was standing by the blackboard. The testimony that they give there at the blackboard I can hear but very little of it; and if you want me to hear it, it will be necessary for you to instruct your witness to speak louder, or else have the witness take the stand.

Mr. DENMAN.—I am very anxious, your Honor, it should be heard.

Q. I will ask you again whether or not that opening which appears on the map with the Golconda Cattle Company's fence on the [318] west and Nelson's fence on the east, is a natural opening and passageway for cattle moving up from the south towards the Toejam Mountain?

A. Yes, sir, cattle can go through that way.

Q. When you say cattle can go through that way, would that be the natural way for them to go, striking this fence, and going north?

Mr. PLATT.—Object on the ground it is a leading question; on the second ground the question has been answered before, and on the third ground it is calling for the conclusion of the witness.

The COURT.—Well, the objection will be sustained on the ground it is leading.

Mr. DENMAN.—(Q.) Well, what can you say as to that pass in through there, with reference to its being a natural or not a natural pass for cattle?

Mr. PLATT.—The question has been asked and answered, if the Court please.

Mr. DENMAN.—I don't think it has, in definite form.

(Testimony of George Russell, Jr.)

Mr. PLATT.—He said cattle would go through there.

Mr. DENMAN.—I ask now whether it is a natural pass for cattle to go through there, between the fences running up from the east and south.

The COURT.—If the only objection is it has been answered before or twice before, I will let it be answered again. It seems to me it would be better if he would give the facts, so we can tell whether it is a natural pass or not.

Mr. DENMAN.—(Q.) Let me ask you, does the Nelson fence extend as indicated on this map, from a point about several miles to the easterly, and lead up towards this Opening No. 1? A. Yes.

Mr. PLATT.—I don't want to keep on objecting to leading questions. [319]

Mr. DENMAN.—It is on your own exhibit.

Mr. PLATT.—It does not make any difference. This is his own witness, if the Court please; and he says does that Nelson fence extend thus and so; he is putting the words in the mouth of the witness.

Mr. DENMAN.—The question is leading, undoubtedly, but it is with reference to an exhibit in evidence; it is their claim as to the location of the fence, and I am simply following the claim, getting a picture in the mind of the witness, as they claim it is.

Q. Tell what direction from Opening No. A, if you know, the Nelson fence extends.

A. It runs east, if I remember.

Q. About how far?

(Testimony of George Russell, Jr.)

A. Oh, it runs east quite a long ways, 5 or 6 miles.

Q. What direction, would cattle coming from the south drifting north, strike that fence?

A. Which fence?

Q. Nelson's fence.

A. Well, that would be a very hard question to answer; they might be either way, might go east or might go west.

Q. If they went west where would they arrive on this map? A. Well, they would go—

Mr. PLATT.—I think that is so problematical, if the Court please—

The COURT.—I will allow that question.

Plaintiff excepts.

A. They would go in this opening here; it is not a pass, it is an opening, there is a mountain there, or hill.

Q. What is the character of the land between the two fences, the gap, as to being smooth?

A. Well, there is a low mountain in there, or hill.

Q. I am talking about the 300 feet between the two fences. [320]

A. Yes, sir. I don't remember just exactly how far this Golconda fence ran up, whether it ran on the hill or not, but I know along this pass there, between Nelson's fence and the creek this is a low mountain in there, or a ridge.

Q. Would cattle drifting along this fence to the westerly, go past through there, and through that gap, going up into Toejam country? A. Yes, sir.

Q. You see marked on the map "Opening No. 5"?

(Testimony of George Russell, Jr.)

A. Yes, sir.

Q. Marked with an arrow with two points on it?

A. Yes, sir.

Q. And from there easterly for 2½ miles did I understand you to testify that was a good cattle country in there? A. Yes, sir.

Q. And that the cattle could get through freely for 2 miles and a half to the easterly?

Mr. PLATT.—He did not so testify.

Mr. DENMAN.—I think he did.

Mr. LEWERS.—Ask him what is the fact.

Mr. DENMAN.—(Q.) What is the fact with regard to the condition of the country for the passage of cattle to the easterly through that territory?

A. There are trails going up through there, and it is over a long ridge.

The COURT.—I did not understand the last of that answer.

A. I say there are trails going up through there over a long ridge; the creek is north of there, and there is a bald mountain, as we term it there, where cattle or stock pass over these trails going into Toejam Creek.

Q. Is there any brush, obstruction of that kind there to hold cattle back? A. No, sir.

Mr. PLATT.—Same objection. I didn't have time to interpose it, and I move the answer be stricken out. [321]

Mr. DENMAN.—(Q.) Any feed there?

The COURT.—It seems to me you don't try to avoid direct questions as much as you might. It

(Testimony of George Russell, Jr.)

leads to objections, and it is not pleasant. If you will avoid them as much as possible, I think it will expedite matters.

Mr. DENMAN.—(Q.) What is the character of the vegetation in there—oh, pardon me, is there any vegetation in there? A. Yes.

Q. What is the character of the vegetation in there? A. Bunch grass.

Q. What can you say as to its thickness?

A. A good year it is very thick, and is considered a good feed country.

Q. Anything else in the way of feed besides bunch grass?

A. I believe that is all I ever noticed there; might be different kinds of grass, it is termed bunch grass.

Mr. DENMAN.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Do you know whether that is private land or not, up in that Toejam country?

A. Why, some of it is owned by individuals, and there is some Government land in there I believe, if I remember the map.

Mr. DENMAN.—(Q.) Do you know of your own knowledge anything about it?

A. Yes, sir, we have maps in our office of a portion of that country.

Q. Do you know of your own knowledge anything about the actual ownership, yourself?

A. I know some of it, yes, sir.

Mr. PLATT.—(Q.) State whether or not that land indicated on the plat in the blue right next to

(Testimony of George Russell, Jr.)

that thing, as Mr. Denman [322] calls it, looking like an angleworm or snake, up in the northeast corner, is private land or not?

A. Well, I could not tell from that map.

Q. You don't know then of your own knowledge?

A. No, sir.

Q. Do you know the character of the land, as to whether it is private or public land, on the other side of Toejam Mountain?

A. Which side do you call the other side?

Q. The northeast side.

A. No, sir, I never saw the map of that country.

Q. Ever been over there? A. Yes, sir.

Q. What is the condition of the country on the other side?

A. Very good country over there; good feed country, lots of bunch grass and shade.

Q. Is it fenced in at all?

A. No, sir, I don't believe it is.

Q. Do you know whether it is or not?

A. I could not swear whether it is or not; it was not the last time I was there.

Q. When were you there?

A. Well, I have not been over there in several years, down through the creek there, but out by what we call Falcon, a mining camp over there, an old deserted mining camp.

Q. About how long ago was that you were there?

A. I should judge six years ago.

Q. Is it pretty steep coming from that direction into what is represented as the inclosure there?

(Testimony of George Russell, Jr.)

A. Why, the hills are more rolling after you get up to this mining camp. I could state there is an old road comes down from this mining camp onto the creek, that is from the north side, and evidently been used at one time to haul wood; there is lots of cord-wood piled up, or was at the time I was there, on this creek, to be hauled to Tuscarora, and after you cross the creek on the south side are these [323] stock trails I speak of, coming up over the mountain between those two fences.

Q. Is it pretty steep to get up there to that point represented in the blue upon the plat?

A. No, sir, I would not call it very steep. These trails come up gradually, you know, on a small grade, ascending grade, like all stock trails are.

Q. You don't know whether there are any fences back there or not?

Mr. DENMAN.—Object to that question as incompetent, irrelevant and immaterial. The Government has not claimed in any portion of the pleadings that there are fences there.

Mr. PLATT.—I understand counsel have endeavored to enlarge the scope of that map by putting some additional territory without the inclosure.

The COURT.—I will allow the question.

A. As I stated before, when I was there about six years ago, there were no fences.

Mr. PLATT.—(Q.) Not six years ago?

A. Yes, sir. Do I understand you correctly, north of Toejam around Falcon; is that where you have reference to, that mining camp?

(Testimony of George Russell, Jr.)

Q. I think so; I mean that land in this direction, that is, in a northeasterly direction.

A. No, sir, there were no fences there at that time.

Q. Not six years ago? A. No, sir.

Q. Now you say at Opening No. 6 in the fence, and Opening No. A in the fence, that it would be a natural place for cattle to go through; is that true?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said Opening No. A cattle do go through there.

Q. You said cattle do go through there?

A. Or can go through there.

Q. Then you don't mean to be understood it is a natural place [324] for cattle to go through?

A. Well, under the conditions now it is.

Q. Why under the conditions now is it natural?

A. Because prior to the time Mr. Nelson had his fence there, they would go over that country, it is a level country, and keep further to the right than they do now.

Q. Prior to whose putting up the fence there?

A. Mr. Nelson's putting up the fence there.

Mr. DENMAN.—(Q.) The fence throws them to the west then? A. Yes, east or west.

Q. Towards the Government territory?

A. Yes.

Mr. PLATT.—(Q.) Is it natural for them to go through there now?

A. I suppose it is, or has to be.

Q. Well, it is just natural, is it not, because there is a gap in the fence, and there is not any other place

(Testimony of George Russell, Jr.)

for them to go through; is not that what you mean? In other words, they cannot jump the fence, or go under it, so they go through a gap in it.

A. Yes, sir, that is the way they have to go.

Q. That is practically what you mean, is it not?

A. Yes.

Q. How about Opening No. 6 down here?

A. That is a natural opening.

Q. That is a natural place? A. Yes.

Q. Anybody congregating a lot of cattle in the southeast corner of this plat, or outside of this so-called inclosure, and wanted to drive them along the creek, going north, it would be a natural place for them to collect them down here, would it not? That is what you mean, is it not?

A. No, I don't mean exactly that. You understand it is the instinct of cattle and stock in the summer-time to work north to the bottom ranges, and cattle coming through these passes I speak of, Hot Creek pass and Willow Creek, naturally would strike the creek in that vicinity, and it would [325] discommode them very much making them travel very far.

Q. These cattle coming up along Willow Creek at the southwest corner of the plat, would go along the creek, and collect at Opening No. 6; is that what you mean? A. Yes.

Q. And it would be a natural place for them to go up? A. Yes, sir, a very good place.

Q. Now, suppose there were lots of openings made in the fence all along here, down the southern por-

(Testimony of George Russell, Jr.)

tion of the fence, can you tell the Court whether there would be any other natural places for the cattle to go up in along the bed of Willow Creek, or if necessary, or if they desired to graze upon the Government land further north?

A. It would be impossible for them to cross the creek, or the old bed of the creek, much farther west than this natural passage now, on account of the Willow Creek dam or lake there; it backs water up quite a distance now, I notice, and that would keep them from crossing much farther west than that opening in the fence at the present time.

Q. Than the opening in the fence? A. Yes, sir.

Q. That is cattle that work themselves along Willow Creek? A. Yes, sir.

Q. Now, suppose there were cattle that came from the west or northwest, in your experience as a cattleman, would it be the logical thing for those cattle to go clear around this inclosure up to Opening No. 6, before they sought to go north? A. No, sir.

Q. It would not, would it?

Mr. DENMAN.—I object to the question on the ground it is not shown any cattle ever worked across from the west onto Government territory. The testimony all is the cattle worked up the creeks into the Government country.

The COURT.—You may ask the question. [326]

Mr. PLATT.—(Q.) You say it would not be natural for cattle to work clear around the inclosure, and go through Opening No. 6? A. No, sir.

Q. As a matter of fact, the natural thing would be

(Testimony of George Russell, Jr.)

for them to go through such openings as are in the west fence, would it not? A. From that side.

Q. And in going through those openings, if they were going in the Toejam Mountain country to the easterly side of this inclosure they would logically go, wouldn't they, across some of the Government land?

A. Yes, cows generally take the shortest cut.

Q. You say a cow usually takes the shortest cut?

A. Yes.

Q. Is that true of cattle? A. Yes.

Q. That is true of all cattle, is it not? A. Yes.

Q. In other words, if they went up against a fence and found a gap in it, they would go through it, wouldn't they? A. Yes.

Q. Now, in your experience as a cattleman, suppose you were driving a thousand head of stock from the west going east, and there were openings all along the west side of this inclosure, would you drive your cattle clear around the inclosure until you found this opening, or would you go right straight through there?

A. Well, I would endeavor to go straight through.

Q. And more particularly, wouldn't you, if you were driving your cattle across land which was suitable for grazing?

A. Well, that would depend on conditions.

Q. It would depend on conditions. And it follows, does it not, as a cattleman I take it you will agree with me, if all the west side of the fence was closed up, and you could not go through, naturally you

(Testimony of George Russell, Jr.)

would have to go around where you could get through, wouldn't you? A. Certainly.

Q. Now how about driving cattle from the north, and going south. Suppose as a cattleman, you were driving cattle from the north, [327] going south, and no openings in the northern part of the fence?

A. Well, I can illustrate that to you by my experience, when we rodeoed north we used to drive our cattle back on the range, and drive them around Rock Creek field, drive them around the Noble field; I am speaking of from the north side.

Q. Where would you collect the cattle from the north side to drive them around the Noble field?

A. We used to collect them right below the field on Toejam Creek.

Q. Suppose you wanted to graze your cattle, not on private land belonging to somebody else, but suppose you wanted to use the privilege of grazing them on the Government land within this inclosure, if there were no openings from the north, you would have to come clear around to this opening on the south, wouldn't you? A. Yes.

Q. Now, Mr. Russell, do you know of any natural places along the north border of that fence at which you might collect your cattle, in the event there were openings in that North fence, in order that you might graze within the Government land, or on the Government land?

Mr. DENMAN.—Object to that on the ground it is not shown there was any practice or custom of the country to make such a use of that territory. What

(Testimony of George Russell, Jr.)

might be done with regard to that district, I take it is not a matter pertinent here.

Objection overruled. Defendant excepts.

A. Answer the question?

Mr. PLATT.—(Q.) Do you know of any natural place, I asked you, where cattle might be collected, and where an opening might be formed in the north side of the fence, so if you desired to graze your cattle upon the Government land inclosed here, you might collect them for that purpose, and drive them through the gap or opening?

A. I have never been on Rock Creek since that fence [328] was built.

Q. Have you been there before? A. Yes, sir.

Q. Were there any natural places to get upon the Government land from the north? A. There are.

Q. You don't know that those places have been changed, do you?

A. No, sir, I could not say anything about that. I was never up on Rock Creek since the fence was built.

Q. How long ago did you familiarize yourself with the condition existing along Rock Creek, and more particularly along the north of the plat?

A. How many years ago?

Q. Yes.

A. I was over there in 1899, the first time.

Q. At that time do you recall whether there were plenty of places at which cattle might be collected, so that they might be driven upon this Government land? A. Oh, yes.

Q. As a matter of fact, Mr. Russell, there are just

(Testimony of George Russell, Jr.)

as good places along the northern border of this field, are there not, as there are upon the southern border, or the southeast border, to collect cattle, for the purpose of driving upon this inclosure?

A. I should say there are.

Mr. DENMAN.—We concede that, Mr. Platt, there is no question about that.

Mr. LEWERS.—Will you show anybody ever drove them over there?

Mr. PLATT.—I have demonstrated that, and shown it by several witnesses, if the Court please.

Q. Do you know, as a matter of fact, whether the Golconda Cattle Company has ever driven sheep from the west upon the land or inclosure represented in the white, and lambed and grazed those sheep upon that Government land?

A. I could not say as to that, about their sheep, I never paid any attention to them.

Q. Have you ever noticed whether they have driven any cattle that way or not?

A. Yes, sir. [329]

Q. Do you know whether they have or not?

A. Why, they have in common; when I say in common, I mean with other parties, our two outfits was worked in there together, and drive the cattle as we find them.

Q. What two outfits were worked together?

A. Golconda Cattle Company and the Russell Land and Cattle Company.

Q. Is that the company of which you are a stockholder or official? A. Yes.

(Testimony of George Russell, Jr.)

Q. What is your official relation to that company?

A. I am vice-president of the company.

Q. How is it that you both worked your cattle together across that territory?

A. Well, because they mixed.

Q. Have you an understanding with the Golconda Cattle Company that you work together for that purpose? A. Yes, sir.

Q. Do you remember how often the Golconda Cattle Company and your company in common worked cattle from the west along over these lands, inclosed Government lands? A. Once a year.

Q. And for how long a time?

A. Why, a day or two, the time it takes to what we call rodeo, or work the country to get all the cattle out of the country.

Q. Over what country do you work?

A. Well, we worked not particularly with reference to that map, over all that country.

Q. Over all this country represented in the white?

A. Yes, sir.

Q. Now for how many years have you been doing that?

A. Well, I could not say just exactly how many years. The Golconda Cattle Company ran cattle in there for quite a while, that is, steer stuff, and then they afterwards bought the Squaw Valley Ranch, and turned their "C" stuff up there, and when they [330] came in possession of that land of course we worked together there; but I forget, or at least I don't know the time they bought the Squaw Valley

(Testimony of George Russell, Jr.)

Ranch or property, but it is since that time that we have worked in common there; in fact, they never ran an outfit there until that time, except in the fall of the year.

Q. Can you tell the Court, Mr. Russell, the general character of that land, the Government land inclosed? A. I can.

Q. What is the general character?

A. Why, it is rolling hills in there.

Q. But more particularly as to vegetation, what is the character of it?

A. It is generally fed out pretty close in there.

Q. What do you mean by feeding it out pretty close? A. A portion of that country is lambed.

Q. Lambed? A. Yes, sir.

Q. And is it pretty good feed for sheep?

A. I should judge it should be, I am not a sheepman, but I have not heard any complaint about it.

Q. What is the character of the vegetation, did you ever look at it? A. Bunch grass.

Q. Is it plentiful during certain seasons of the year?

A. Yes, sir, on a part of it, and some of it is kind of barren hills.

Q. How does it average up, the whole thing?

A. Well, I would call it a fair bunch grass country.

Q. A fair bunch grass country? A. Yes.

Q. And do I understand you to say even after sheep had been driven over it or lambed there, that your company and the Golconda Cattle Company

(Testimony of George Russell, Jr.)

had grazed cattle upon it?

A. Well, these cattle went in *their* of their own accord, and we drove them away from there, because the feed wasn't good, to get them higher up.

[331]

Q. And you drove them to other portions of the Government land?

A. Yes, sir, drove them through this opening there.

Q. While driving them, were they grazing upon the Government land? A. Oh, yes.

Q. And was there sufficient for them to eat?

A. Yes, sir, I think there was a little feed there, they got along.

Q. This is after the sheep had devastated the country? A. Yes.

Q. Do you know whose sheep they were?

A. Nelson's sheep I have seen in there.

Q. Did you ever see any Golconda Cattle Company sheep? A. Not that I remember.

Q. Were Mr. Nelson's sheep grazing upon this land within the inclosure? A. Yes, sir.

Q. On the Government land? A. Yes, sir.

Mr. PLATT.—I think that is all, if the Court please.

Mr. DENMAN.—I do not think there is anything further.

The COURT.—(Q.) Mr. Russell, I wish you would tell me something more about that range of hills or mountains on the south side of Willow Creek ridge, from the junction of Willow and Rock Creeks, toward the northeast.

(Testimony of George Russell, Jr.)

A. That is a large mountain in there.

Q. Will it turn cattle?

A. Yes, sir, it turns cattle. There is a creek south of this mountain, and south of the mountain at the head of the creek, there is another high mountain or peak, forming a natural pass that stock will follow this creek up to the head, and go out through the pass, and come down on Willow Creek.

Q. Is that pass on the map?

A. No, sir, I don't believe it is shown there.

Q. Is it below the junction of Willow and Rock Creek? [332]

A. No, sir, it is about opposite the Squaw Valley dam.

Mr. LEWERS.—(Q.) You mean the Willow Creek dam?

A. Yes, the Willow Creek dam, and Squaw Valley.

The COURT.—(Q.) About how far is it from the junction of the two creeks?

A. Willow and Rock Creek?

Q. Yes.

A. I should judge it would be 7 or 8 miles up there.

Q. Is it above or below that dam?

A. Well, this long mountain extends from Butte Creek, possibly a mile above the junction, Butte Creek comes in and forms a pass, and Butte Creek intercepts Willow Creek about a mile above the junction.

Q. Give that again.

A. Butte Creek intercepts Willow Creek about a mile above the junction, I should judge, of Rock

(Testimony of George Russell, Jr.)

Creek and Willow Creek, and then it would be north and east of Butte Creek, this large mountain extends for about 5 or 6 miles, and terminates opposite Willow Creek dam; that is, the mountain forms part of Willow Creek Canyon from the north side, and slopes down into Willow Creek, the canyon does.

Q. Is there a pass at Butte Creek through which cattle can go? A. Into Willow Creek, you mean?

Q. Yes.

A. Yes, sir, there is; it follows Butte Creek up to the head, and then there is a large mountain between this mountain I speak of, I don't know the name of it, and cattle go out through this pass; it forms a natural pass, a low pass through there, and come down over what we call Alkali, on Hot Creek, and strike Willow Creek about this opening in the fence there.

Mr. PLATT.—May I ask just one question. Does that mountain about which you testified, and which you say has a pass in it available for cattle, is that mountain within or without the fence line as shown upon the plat? A. Without.

Q. It is without? A. Yes, sir. [333]

Mr. DENMAN.—(Q.) The mountain, then, is between the cattle coming from the south, and this south fence line? A. Yes.

Q. And that is what turns them up towards this Opening No. 6, and the territory easterly of the reservoir? A. Yes, sir.

Mr. DENMAN.—That is all.

(Court adjourns until Saturday, March 9th, 1912, at 10 o'clock A. M.) [334]

Saturday, March 9th, 1912, 10 A. M.

[**Testimony of J. Sheehan, for the Defendant.**]

J. SHEEHAN, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. What is your full name, Mr. Sheehan?

A. J. Sheehan.

Q. You live in Winnemucca, Nevada, do you not?

A. I do.

Q. And you are cashier of The First National Bank at that place? A. I am, yes, sir.

Q. How long have you held that position?

A. About 6 or 7 years.

Q. State whether or not you have ever had any experience in the cattle business, or any connection with it. A. I have.

Q. When and where?

A. Well, principally in Elko County some years ago.

Q. About how many years ago, approximately?

A. Probably 20 years ago.

Q. What was the nature of that experience,—in general, I mean?

A. Working on ranches, on different ranches in Elko County.

Q. Are you familiar, or have you ever seen any portion of the Squaw Valley Ranch of the Golconda Cattle Company? A. I have.

Q. When were you there, as near as you can fix

(Testimony of J. Sheehan.)

the time? A. About ten days ago.

Q. And in whose company did you go there?

A. Mr. Button, F. J. Button, Mr. S. G. Lamb, Mr. Petrie, and Mr. Lewers, yourself.

Q. And was not Mr. Tilden also present?

A. Mr. Tilden, yes, sir, the surveyor was present.

Q. How did you go to the Squaw Valley Ranch on that occasion? [335]

A. We went to the ranch in an automobile, and from the ranch to a little above the reservoir in an automobile; we then took saddle-horses and went over the range.

Q. Did you go up to the reservoir on the first day that you were there? A. No, sir, the second day.

Q. Will you step down and examine this plat, so that you may understand it. The line on the north side represents Rock Creek; the line on the south side represents Willow Creek, and this portion here represents the reservoir to which you have testified; and this line here indicating a stream, represents what is known as Siawappe? A. Yes, sir.

Q. And this portion up in there, that line that I follow with the pointer, represents what is called on this map North's fence, and sometimes referred to as Noble's fence. Are you able from that description to locate any of the portion of the territory shown on this plat, from your recollection?

A. I am, yes, sir.

Q. I call your attention to a point marked "Opening No. 1," with a dotted line following that, purporting to represent what is known as the Midas-

(Testimony of J. Sheehan.)

Tuscarora road; were you down at point No. 1?

A. I was.

Q. On which day were you at point No. 1, the first or second day? A. The first day.

Q. Will you describe what you found at point No. 1?

A. We found what is known as a lane, or an opening at that point.

Q. And state whether or not the road known as the Midas-Tuscarora road ran anywhere in the vicinity of that lane.

A. It passed right through it.

Q. Now, I understand you to say that on the next day you went to a certain point in the automobile; where, as near as you can fix [336] it from your recollection, was it that you went in the automobile?

A. About 2 miles above the reservoir.

Q. You are referring to the Willow Creek Reservoir?

A. Yes, sir, to a point at about the end of the fence, where the fence ends.

Q. Will you describe what you saw there with reference to the fence and to the surrounding country?

A. Well, the surrounding country, I suppose stockmen would call it a draw; that is, it was an open canyon with other little canyons leading into it coming in there; and at that point we took our saddle-horses.

Q. What did you there observe, if anything, with reference to fences?

(Testimony of J. Sheehan.)

A. Well, that was the end of the fence running in that direction, it was then open to a fence running in the opposite direction.

Q. You mean in the opposite direction, or at right angles? A. Well, possible at right angles.

Q. At right angles? A. Yes.

Q. You say at that point you went on horseback?

A. Yes, sir.

Q. Where did you go on horseback? Just a moment, I withdraw that question. When you speak of the end of the fence, will you step down and examine this plat, and point out where that was on the plat, this being the reservoir, and the red line purporting to represent the fence.

A. That would be about here (indicates).

Q. Indicating Opening No. 6. Is that the place that you have stated was a draw with a number of canyons leading into it? A. Yes, sir.

Q. Now will you describe generally at first where you rode on horseback?

A. We followed along the fence leading towards what would be indicated on that map as the North's fence, off in [337] that direction; that is, it is north, I believe.

Q. That is, you followed that general direction up to you say what is indicated on this plat as North's fence? A. Yes, sir, I think that would be it.

Q. State whether or not on that trip on horseback you found any trees. A. We did.

Q. And will you state where those trees were with reference to any fence that you may have found?

(Testimony of J. Sheehan.)

A. We found a clump of trees at a spring, and I believe it is right at the end, about the end of the fence known as the Squaw Valley fence, and about beginning at a fence known as the Nelson fence.

Q. Do you remember the kind of posts that were in the Nelson fence?

A. Just the native posts of the valley there, cottonwoods, I should say.

Q. Cottonwoods? A. Yes, sir.

Q. What if anything, was there in the way of an opening at the point where you found these trees?

A. There was an opening there.

Q. What kind of an opening?

A. There was no fence, there was just posts, and the wire was down, that is, there was none there, I could not see any, I did not.

Q. Will you again step down and examine the map for a moment. I call your attention to the red line coming down there which has been denominated as Nelson's fence.

The COURT.—The red line Nelson's fence?

Mr. LEWERS.—This red line here, as I understand it, has been testified to as Nelson's fence.

Mr. PLATT.—I don't think so, if you will pardon me. If the Court please, the map shows that Nelson's fence is marked plainly Nelson's fence, underneath it a black line. The red line is a line testified to as having been constructed by the Golconda [338] Cattle Company as a part of their line fences.

Mr. DENMAN.—Is it your contention that this red line above opening No. A is built by us?

(Testimony of J. Sheehan.)

Mr. PLATT.—Yes.

Mr. DENMAN.—Then we will have to go over the fence; we misunderstood it; that is Nelson's fence.

Mr. PLATT.—The legend describes that.

Mr. DENMAN.—It does not say by whom.

Mr. PLATT.—The only part upon the plat marked Nelson's fence is the black, and all the testimony was to that effect. It is immaterial, if the Court please, just so we know the facts.

Mr. LEWERS.—You may recollect, I think this will bring the testimony back to your mind, Mr. Platt, and that of the Court, that Mr. Osborne testified with reference to that red fence running up there, and stated it was not any part of the fence that had been built by him, and that it was known as Nelson's fence; and the plat shows that it is connected, and is a continuation, apparently making a field, with the fence marked in black, "Nelson's fence."

Mr. PLATT.—Well, whatever the facts show, if the Court please, it does not disturb our theory of the case.

Mr. LEWERS.—I think we might stipulate as to that point; there is no question but what that is our fence.

Mr. PLATT.—If Mr. Flocker testifies, or the record shows it, that will be conclusive.

Mr. DENMAN.—What does Mr. Flocker say?

Mr. PLATT.—Mr. Flocker, I wish you would examine that portion indicated in the red along where Nelson's fence is indicated, just above the black line, and state whether or not you testified that was a

(Testimony of J. Sheehan.)

fence constructed by the Golconda Cattle Company, or by Nelson. [339]

Mr. FLOCKER.—I testified that Mr. Petrie told me, and you would not let it go in the record, that Thomas Nelson had built it.

Mr. LEWERS.—You did not understand, Mr. Flocker, that that was built by the Golconda Cattle Company, did you?

A. I did not. The remarks on the side show that.

Mr. DENMAN.—And that is the fence which begins at the north end of Opening No. A, and runs in a general north by east direction, and thence easterly, into Toejam Mountain? A. Yes.

Mr. PLATT.—In other words, it is a continuation of the black Nelson fence?

A. It is a newly constructed and changed position of Nelson's fence.

Mr. DENMAN.—That was not there in April, when you went in last year?

A. No, sir.

The COURT.—Does that fence take the place of any fence previously erected by Nelson, Mr. Flocker?

Mr. PLATT.—No, your Honor.

Mr. FLOCKER.—It does not take the place of a fence built by Mr. Nelson, but it is an extension of one that was already there, and a slightly changed position, and extended quite a considerable distance north of east.

The COURT.—It is an extension of a fence which was already there?

A. Yes, sir.

(Testimony of J. Sheehan.)

Q. The previous fences had not been moved then?

A. No, sir.

MR. DENMAN.—(Q.) Now, Mr. Flocker, this black line you have on here represents what the fence formerly was?

A. Yes.

Q. This black line here represents the old fence as it stood?

A. The black line represents the old fence as it stood at the time of my first investigation, and the natural barrier was shown, going from the end of Nelson's fence, old fence, around this way to North's fence; and at the time of my investigation in July, Nelson's fence line had been changed, and placed in this position, [340] and extended up here and into the mountain.

Q. Where is that first map, Mr. Flocker, or where is the first one you drew?

A. I guess it is in the office in San Francisco.

Q. Is it not up here, as a matter of fact?

A. I don't know whether Mr. Platt has a copy of it or not.

MR. PLATT.—I can look and see.

MR. DENMAN.—You remember you showed it to me, Mr. Platt in one of conferences. I would like you to produce that map.

MR. LEWERS.—Just one more question, Mr. Flocker, to have the record clear. As exhibit No. 1 now shows, there is apparently a black line fence extending beyond the point where the red fence cuts into it, is that the fact?

(Testimony of J. Sheehan.)

A. I don't believe it is a fact; I didn't go over it to see whether they took down the old fence or not; in July, 1911, we didn't go over to see whether he had taken down the old fencing, when the fence was changed to the new position.

Q. And I will ask you one other question in that connection: Does this north line of the Nelson fence run due east and west, or does it cut toward the south-east?

A. To the best of my knowledge, it runs due east and west.

Q. Do you remember taking a course on that?

A. I don't believe I did.

Q. Did you follow that out to see whether they had completed any field? A. No, sir.

Q. So that this end of the fence indicated on your plat does not necessarily indicate that the fence does end there? A. No, sir.

Mr. LEWERS.—That is all. [341]

Mr. LEWERS.—(Q.) Now, Mr. Sheehan, I was asking about the territory in the vicinity of that clump of trees; when you speak of an opening I will ask you whether that opening is the one which is here indicated as opening No. A, at the point I am showing you? A. It is, that is the opening.

Q. Will you describe the character of the ground in that opening and on the sides of it; I mean with reference to whether it was rocky, hilly, smooth, or what it was? A. Right at the opening?

Q. Yes.

A. Why, it was smooth, as far as I could see; there

(Testimony of J. Sheehan.)

was some snow there, just on the side of the hill; we dismounted at that point, walked around there, and tightened our saddles.

Q. Did you see any obstruction in that opening in the way of brush, rocks, trees, or anything else?

A. No, sir; we did not.

Q. State whether or not that was such an opening that cattle, or even a wagon could be drawn through.

Mr. PLATT.—Same objection, if the Court please, as we heretofore interposed, upon the ground that it calls for an opinion of the witness.

The COURT.—Same ruling and same exception.

Mr. LEWERS.—(Q.) Answer the question.

A. We went through it with saddle horses, I believe cattle could go through it.

Q. Was there any obstruction in that opening at all? A. No, sir.

Q. Now, at that point you said you dismounted, did you observe any of the country towards the east or northeast? A. We did.

Q. What did you observe?

A. Well, that it was a country of rolling hills and canyons off to the north of us, similar to the [342] surrounding country all around it.

Q. What kind of hills, will you describe them a little more fully.

A. Well, they were rolling hills until, I could see further off, gradually getting higher to almost mountains, a long ways, though, from where we were.

Q. A long ways, you say? A. Yes, sir.

Q. Now, did you see anything there in the way

(Testimony of J. Sheehan.)

of rim rock? A. Not there, no sir.

Q. Was there anything there, if there was describe it, that would obstruct the passage of cattle?

A. I saw nothing.

Mr. PLATT.—Same objection, if the Court please; and the further objection that the question is leading. I did not object to the other leading question, I thought it was preliminary. I don't think the witness ought to be led, if the Court please.

Mr. LEWERS.—I am endeavoring not to. I asked him to describe a country, and to save time I called his attention to it.

The COURT.—It will be the same ruling and the same exception. The objection that it is leading I will ignore for the present, but you must avoid leading questions just as much as possible.

Q. I shall endeavor to do so, if the Court please. Now, Mr. Sheehan, after you had reached the point indicated on the plat as "Opening No. A," where did you go?

A. We went across—I have forgotten the name of that creek; I think they called it Toejam, off in that northern direction.

Q. Well, with reference to this fence you have described as built on cottonwood posts, Nelson's fence, where did you go?

A. We followed that fence off in a northerly direction; I could indicate on the map.

Q. I wish you would do so; take this pointer and indicate so [343] that the Court may see.

A. At this point here (indicating).

(Testimony of J. Sheehan.)

Q. Indicating Opening A.

A. We went across in this direction.

Q. That is, did you follow up that Nelson fence?

A. Yes, sir, we followed up the Nelson fence along here, to a point about in here (indicates).

The COURT.—That is, he followed up the Nelson red fence?

Mr. LEWERS.—Up the Nelson red fence to a point indicating the end of the arrow to the right of the exhibit, marked “Opening No. 5.”

The COURT.—Well, that is to the south end of the opening?

Mr. DENMAN.—It is southeasterly.

Mr. LEWERS.—It would be the southeast end.

A. Yes, sir, we followed about down there.

Q. Then where did you go?

A. Then we cut across to this creek in here.

Q. What is known as Toejam Creek here?

A. Yes.

Q. I believe it is not indicated on here at all, is it?

Mr. DENMAN.—No, it is indicated on that other map. This is a map made by the surveyor who was there at the time.

Mr. LEWERS.—This map just came into the courtroom; we have not identified it yet. We will withdraw Mr. Sheehan for a moment, with the Court's permission. Will you step out, Mr. Sheehan; and Mr. Tilden, will you take the stand?

Mr. DENMAN.—Before Mr. Tilden goes on the stand, I would like to ask one question of Mr. Flocker. [344]

[Testimony of Ira M. Flocker.]

Mr. DENMAN.—(Q.) At Opening No. 5 the words “North’s fence to Noble’s fence” appear; that is a mistake, is it not, that means North’s fence to Nelson’s fence, does it not? A. Yes, sir.

Q. Will you correct that on there with your own hand.

(Witness makes correction on map.)

Q. Now, will you identify this red line here, running from Opening No. A to the arrow, as Nelson’s fence.

Mr. PLATT.—It is so indicated by the legend, I think, on the right.

Mr. DENMAN.—The legend was stricken out. (Witness marks line as requested.)

Q. Now, put your initials under that, please, Mr. Flocker.

(Witness marks initials on plat.)

Q. That was not there in April, 1911?

A. I could not testify to that, because I was not up that far; I merely came up to a point in section 20, township 39 north, range 49 east, in order to see whether or not this original gap as originally reported at that point had been closed.

Q. At that time had not been closed?

A. Had not been closed; it was not closed at the south end; I don’t know whether or not they were working at the north end.

Q. You don’t know whether anybody was working at all, do you? A. No.

Q. You didn’t see anybody there, did you?

(Testimony of Ira M. Flocker.)

A. No, sir.

Mr. PLATT.—I would like to ask Mr. Flocker a question or two.

Q. Upon what visit that you made did you notice that this gap about which you have just been testifying was closed? A. On July 22d.

Q. That was your second visit? A. Third. [345]

Q. You noticed on your third visit that gap had been closed? A. Yes, sir.

Mr. DENMAN.—One moment. He does not mean closed. He says on the map there it was open.

Mr. PLATT.—He does say it was closed.

The COURT.—I think it would be just as well to let the witness answer without correcting him; it simply makes confusion, and distracts the attention, and if he don't answer as he should, you can cross-examine. I will never refuse that.

Mr. DENMAN.—I should have objected to the question as leading.

Mr. PLATT.—This examination, if the Court please, is based upon the direct examination of the counsel taking a witness out of order.

The COURT.—You may proceed, Mr. Platt.

Mr. PLATT.—(Q.) When I asked you the previous question, you understood that I meant, did you, the gap indicated in the black upon the plat?

A. Yes, sir.

Q. Now, state whether or not, without again expressing your understanding of it, upon what visit was that gap represented in the black closed.

(Testimony of Ira M. Flocker.)

A. July 22d, 1911.

The COURT.—I wish you would ask those questions again, Mr. Platt; my attention was distracted, and I don't understand just what the witness testified to.

Mr. PLATT.—(Q.) As I understand, Mr. Flocker, the black line upon the extreme right of the plat with the 35 or 40 little black marks extending therefrom, represents a gap in the Golconda Cattle [346] Company's fence, which you discovered when you made your first and second visit to the property?

A. Yes, sir.

Q. Now, I asked you whether that gap was closed up by a line of fence represented in the red upon the plat when you made your third visit?

A. Yes, sir.

Q. Now, did you testify upon direct examination as to who built that line of fence indicated in the red?

A. My map indicates it was built by the Golconda Cattle Company; I don't remember whether I testified to that or not.

Q. Will you state now if, in your own knowledge, that red line of fence was Golconda Cattle Company fence or not?

A. It was Golconda Cattle Company fence.

Mr. LEWERS.—Pardon me; which red line are you referring to?

Mr. PLATT.—I have not referred to but one red line all the time; it is the red line to which he testified as having closed up the original black gap.

Mr. DENMAN.—Now, will you kindly, Mr. Platt,

(Testimony of Ira M. Flocker.)

indicate by some designation the beginning and end of that line?

Mr. PLATT.—Well, if the Court please, I am going to bring this out, and I don't want anything that is not here.

Q. Now, you also testified by interruption during Mr. Sheehan's testimony, that the red line which you have since marked in lead pencil, and apparently an extension of the lower red line, was upon your third visit constructed, and that that upper red line was Nelson's fence; is that true?

A. To the best of my knowledge, it is Nelson's fence; I didn't testify to that, they would not allow it to go in the record.

Q. Well, you testified to it during the interruption of Mr. Sheehan's testimony, didn't you?

A. Yes, sir.

Q. And you state now to the best of your knowledge, that upper red line represents Nelson's fence?

A. Yes. [347]

Q. And that you discovered that upon your third visit? A. Yes, sir.

Q. Now, state whether or not upon your third visit you discovered an opening in this so-called red fence of the Golconda Cattle Company and of Nelson, which you have in fact shown upon the plat as "Opening No. A, 300 feet opening at Nelson's new fence line." A. Yes, sir.

Q. Now, you discovered that opening, didn't you?

A. Yes, sir.

Q. And upon what visit did you discover it?

(Testimony of Ira M. Flocker.)

A. My third visit.

Q. Then your plat correctly represents the facts as you found them upon your third visit?

A. Yes, sir.

Q. You have indicated upon the plat in the red, haven't you, as a legend, that this opening was at Nelson's new fence line? A. Yes, sir.

Q. Now, on the right here, Mr. Flocker, there is a characterization which you have designated in the legend as a natural barrier; what kind of a barrier was that?

A. That was exposed rock which would turn stock, the side of a round rocky knoll, and was made by the stream working against the side of the knoll, and turning south in its course.

Q. What was the elevation of that barrier, if you know?

A. The elevation would be only given approximately; I had no barometer or anything with me.

Q. Well, approximately?

A. I should say a thousand feet above the valley.

The COURT.—Excuse me, Mr. Platt; what valley do you mean?

A. I mean the general elevation of Squaw Valley.

Mr. LEWERS.—Would you indicate about what point that would be?

A. Down in the general flat. [348]

The COURT.—Mr. Platt, will you ask him a little more about the relative elevation of that as to the bottom of the stream?

Mr. PLATT.—(Q.) Now, can you testify approxi-

(Testimony of Ira M. Flocker.)

mately how high this barrier is compared with the land indicated in the blue, directly west of it?

A. Well, I should say the land in the blue directly west at a distance of a mile, would be 500 feet higher, relatively speaking.

The COURT.—(Q.) The barrier 500 feet higher?

A. The land, the barrier is down on the stream; the land between Nelson's north fence, and Nelson's fence at that point, would be 500 feet between the barrier down along the edge of the stream.

Mr. PLATT.—(Q.) Then the barrier, as I understand it, is set down about 500 feet lower than this land indicated in the blue? A. Yes.

Q. How high does the barrier rise from the level of the ground at which it commences?

A. Not very high; its highest place, I should say not over 10 or 15 feet, and probably as low as 5.

Q. State whether or not you think, or it is your opinion that this barrier would prevent cattle or horses or sheep from drifting into the so-called inclosure. A. It would at that place, yes, sir.

Q. Why do you give it as your opinion that it would?

A. Because I think the barrier is sufficient to turn stock elsewhere that they would attempt to get around it instead of going over.

Q. Why do you think they would attempt to get around it instead of going over?

A. Because it would be much easier to do it.

Q. Now, you have also marked here another delineation upon the plat, very close to the natural bar-

(Testimony of Ira M. Flocker.)

rier about which you have testified, and which you have indicated upon the legend as being very steep. I wish you would describe that. [349]

A. At that point the canyon is very narrow and rocky, and the south bank of it especially would be difficult to scale, either for people or animals.

The COURT.—(Q.) Which bank did you say?

A. The south bank.

Mr. PLATT.—(Q.) State whether or not, upon your first visit, if you remember, you discovered the end line of Nelson's fence indicated in the black, up close to the south terminal line of the barrier, about which you first testified.

A. It ran close to it, but it didn't run into it.

Q. It ran close to it, as you have indicated here?

A. Yes.

Q. Do you know approximately about how far it was from the end of that Nelson fence line to the terminal part of the barrier, just approximately?

A. Probably a couple of hundred yards.

Mr. PLATT.—I think that is all.

The COURT.—I don't understand that 200 yards.

Mr. PLATT.—It was this, if the Court please: I asked him how far it was from the end of Nelson's fence line.

The COURT.—That is the black fence to the end of the barrier?

Mr. PLATT.—To the south end of the barrier.

(By Mr. LEWERS.)

Q. You observed that portion of the plat which you have marked barrier, near Opening No. A, or near

(Testimony of Ira M. Flocker.)

Nelson's fence on your first visit in September, 1910, did you not? A. Yes, sir.

Q. Onto what portions of that that you have there made a barrier did you go on that occasion?

A. I did not go on the barrier.

Q. How close to it were you?

A. Very close to the upper end, and I could see it.

Q. The question is, how close to it were you?

A. Well, just across the stream, I don't know exactly. [350]

Q. How far in yards or feet or miles?

A. Oh, probably 500 or 600 feet from the upper end.

Q. And how far were you—

Mr. PLATT.—Did you testify you were 500 or 600 feet from the—

Mr. LEWERS.—If the Court please, I protest against interruption.

Mr. PLATT.—If the Court please, I think I am privileged to understand what the witness answered.

The COURT.—You may ask what the answer was.

Mr. PLATT.—The reason I interrupted, if the Court please, counsel said 500 or 600 feet from the upper end, and I didn't understand the witness so to state; I understood he testified it was 500 or 600 feet from the barrier.

The COURT.—You may read the answer.

(The reporter reads the answer.)

Mr. LEWERS.—The question was asked of the witness, and it simply disturbs the examination. I have entered my reason for objecting.

(Testimony of Ira M. Flocker.)

Q. How close were you on that first visit to the lower end of what you have marked as this barrier?

A. About a quarter of a mile.

Q. Then on that first visit you were not on this so-called barrier? A. No, sir.

Q. Did you go to that so-called barrier on your second visit? A. No, sir.

Q. Did you on your third visit?

A. On my third visit I came down over the rocky hill, along the Nelson fence line, to the west of it, came down to the clump of cottonwood trees, I think you call them, where the spring is.

Q. The question is, did you on your third visit go onto that which you have delineated as a barrier?

[351]

A. I did not, I can't—

Q. Well, you have answered the question.

Mr. PLATT.—Well, I think he has a right to explain it, if the Court please.

The COURT.—Well, proceed.

Mr. LEWERS.—(Q.) Mr. Flocker, did you on your first visit go to the portion of the plat that you have marked as a very steep bank, as Siawappe Creek? A. Yes, sir.

Q. To which portion of it did you go?

A. Passing down a ravine from the north toward it, climbed up over the side, turned toward the end, so I could observe the natural barrier along the stream on the other side.

Q. Toward which end, east or west end?

A. The west end.

(Testimony of Ira M. Flocker.)

Q. And were you at any time at the east end of what you have marked on there as the steep bank of that creek?

A. No, sir, not as far as I have shown it.

Q. How steep is that bank?

A. Well, that bank is pretty steep.

Q. In degrees, would you say?

A. Well, I should say it is approximately 45 degrees.

Q. Are there any breaks in the bank where it is less than 45 degrees?

A. Well, not of any consequence.

Q. Well, are there any?

A. There might be a few breaks to it, a few feet drop off steeper.

Q. Do you know whether there are any or not?

A. That was the general character of that bank.

Q. Answer my question. Do you know, in fact, whether or not there were any breaks in that bank?

A. I know what was there at the place I crossed it, that is all.

Q. I still want to know whether you do know, in fact, whether [352] you made a sufficient examination of the entire length of that which you have marked on the plat as bank, to answer whether or not there were any breaks or openings down to the creek through that bank?

A. No, sir, I didn't examine it minutely.

Q. I understood you to testify, I may be in error, on your original examination, that you were no closer than about a mile from what you have marked as the

(Testimony of Ira M. Flocker.)

barrier Toejam Mountain? A. Yes, sir.

Q. Were you ever any closer than that?

A. No, sir.

Q. And do I understand you to testify that this plat is a correct indication of the location of that barrier?

A. Approximately, the methods I used.

Q. That is, does it run in a northwest and southeast direction? A. Yes, sir.

Q. And what is the character of that barrier, what makes it?

Mr. PLATT.—Well, we have gone over that once, if the Court please.

The COURT.—I know we have, but I am interested in this.

Mr. PLATT.—Then I have no objection, if the Court please.

WITNESS.—That is, as I testified before, a rock outcrop.

Mr. LEWERS.—(Q.) Is it rim rock?

A. Yes, sir, looks like rim rock from a distance where I observed it.

Q. Did you from the position where you observed that, a mile down toward the southeast, observe the character of the ground at the north end of what you have marked as a barrier? A. Yes, sir.

Q. What was it? A. It was a smooth slope.

Q. With grass there?

A. I could not see any grass from the distance.

Q. And did you from the point where you were, a mile down, observe what was at the south end of what you have marked as Toejam [353] Mountain bar-

(Testimony of Ira M. Flocker.)

rier? A. Yes, sir.

Q. How could you see it over the hills?

A. There was no hill there.

Q. Do you mean that between the point a mile down of that barrier, there was no hill at all that obscured your view?

A. You are pointing to the wrong point on the map.

Q. I am referring to the south end of the barrier, and wherever you were, down in this country a mile away.

A. From my point of observation which was about the corner of the change in new position of Nelson's fence, that is that arrow point—

Q. Where I have my pointer?

A. Yes, sir, the barrier seemed to run in a southeasterly direction around the side of the mountain, down close to the stream. I have not shown it adjoining the stream, because I was not around there to see whether it did or not.

Q. Why was it that you didn't go over there and examine the barrier itself?

A. Because of lack of time that day, and for the further reason that I was hunting fences.

Q. And on your second visit, in April, 1911, why is it that you did not go up there to examine that so-called barrier?

A. Because on my April visit, I had instructions to see whether or not the original gaps reported by me were closed.

Q. Did you on your July visit go over there to examine what you have called a barrier? A. No, sir.

(Testimony of Ira M. Flocker.)

Q. Why not?

A. Because at the time of my July visit, I was simply accompanying agent Melrose on his examination, and I considered his examination as taking precedence over mine.

Q. Were you not going over the ground for the purpose of directing and showing Mr. Melrose what you had observed before? A. Yes, sir. [354]

Mr. PLATT.—I object, if the Court please, upon the ground—I don't know whether this is direct examination, or what it is.

Mr. LEWERS.—It is cross-examination.

Mr. PLATT.—And if it is cross-examination it certainly is improper cross-examination based upon my direct, because I did not ask him about any barrier, except the ones directly to the east of the blue land in the northeast corner.

The COURT.—I think that is so, but of course whatever you can draw out with reference to the exact conditions there, I would like to have.

Mr. LEWERS.—That was my idea.

The COURT.—But as to other matters, and the contradiction between this testimony and other testimony, I am not particularly anxious about that.

Mr. LEWERS.—I am not either; I am simply desirous of getting at what the witness did.

(The reporter reads the last question and answer.)

Mr. PLATT.—Object on the ground that the purport of his visits are incompetent, irrelevant and immaterial, what his purposes were, because they may not have been carried out, and any purpose not car-

(Testimony of Ira M. Flocker.)

ried out could not be testimony.

The COURT.—I will allow that answer to stand.

Plaintiff excepts.

Mr. LEWERS.—(Q.) Then did you on that third visit with Mr. Melrose go approximately upon the same ground that you had gone yourself on your first visit? A. Yes, sir.

Q. That is what I am trying to get at.

A. Not entirely.

Q. Well, where did you go in with Mr. Melrose on that third visit?

A. We went to the fence line, or the corner of Nelson's fence, new fence line.

Q. Which corner, the one marked by the arrow?
[355]

A. Yes, sir, and then we came in a southwesterly direction and followed along the fence line, Mr. Melrose and I walking, while Mr. Petrie in order to get through with his rig, had to drive around the rock point to the west, to get down.

Q. Then Mr. Petrie was up in there with a wagon?

A. Just up at that point.

Q. Then on that visit with Mr. Melrose you didn't go further north, as I understand it, than this arrow at the east end of the Opening No. 5? A. No, sir.

Q. Did you at that time, together with Mr. Melrose, or with anyone in company with Mr. Melrose, make any observation or examination of this so-called barrier, Toejam Mountain barrier?

A. I merely called Mr. Melrose's attention to the natural barrier as I had it indicated on my map at that point.

(Testimony of Ira M. Flocker.)

Q. Did you call his attention to the natural barrier as it was indicated on the ground? A. Yes, sir.

Q. And there was some discussion on that occasion, without stating what it was, with reference to that so-called barrier, was there not?

Mr. PLATT.—I object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—It is not cross-examination.

Mr. LEWERS.—Has your Honor ruled?

The COURT.—Yes, I will sustain the objection.

Mr. LEWERS.—We desire an exception.

The COURT.—Very well, note the exception.

Mr. LEWERS.—I had not stated my reason for asking it, but it might be obvious from the next question.

Q. Did you and Mr. Melrose after you had reached that point, either of you, go over toward that so-called barrier? A. No, sir. [356]

Q. Did you or Mr. Melrose go over to the other barrier which you have indicated below there?

A. No, sir.

Q. Did you go over onto that portion of the plat which you have indicated as a steep bank?

A. No, sir.

Q. Did you on that occasion make any observation to determine whether there were any cattle trails through this Opening No. 5 and on toward the east and northeast? That may be answered by yes or no.

A. I did.

Q. Did you find any cattle trails? That may be answered by yes or no.

(Testimony of Ira M. Flocker.)

A. I could not answer it by yes or no.

Q. Well, did you find any trails which were either made by cattle, or otherwise?

A. It looked to me as if cattle or animals could get around that spur from Toejam Mountain by bearing to the northwest, or bearing to the northwest from that west arrow marked on there.

Mr. DENMAN.—Northwest; pardon me.

A. Northwest around the side, not over the summit, the northwest.

Mr. LEWERS.—Would not that be northeast, Mr. Flocker?

A. Well, from the east arrow point it would be in a northwesterly direction, turning more north.

Q. Oh, I understand you. Did you not, in fact, find a well-defined deeply worn trail leading through there? A. No, sir.

Q. Did you make any examination down in the draw between the corner of North's fence and Opening A as to any trail or road leading through there?

A. I did not go down in there. My impression is now that there was a gate down in there, without any gate on it, through North's fence. If it is true, I have not indicated it there, but my impression is now that there was a gate down in there.

Q. Without any gate on it? A. Yes.

The COURT.—Can you point to about the place there? [357]

A. Down about this point (indicating on plat).

Mr. LEWERS.—(Q.) That is near the northwest

(Testimony of Ira M. Flocker.)

end of what you have denominated as Toejam Mountain? A. Yes, sir.

Q. I was more particularly calling your attention, Mr. Flocker, to the territory between the west end of the arrow at Opening No. 5, and what you might call the smaller barrier, and I ask you again whether you observed any wagon road or cattle trail leading toward the north or northeast of that portion of the ground? A. I did not.

Q. Did you look for any?

A. Only in a general way, I observed the ground I was going over.

Q. Will you say that there was not any wagon trail leading up through there?

A. I will not say there was not, of course, I might possibly have overlooked it, but I generally observe those things.

Q. Did you at any time go beyond Toejam Mountain to the east? A. No, sir.

Q. I mean Toejam Mountain as you have indicated it on the map?

A. You misunderstand my legend there.

Q. Is it not a fact, Mr. Flocker, that standing at the point indicated by the east arrow on Opening No. 5, and looking toward the east and northeast, that there is a series of rolling hills gradually getting higher toward the north and east?

A. Yes, sir, that is true south of that stream.

Q. South of which stream, Toejam?

A. No, the head of Siawappe, it was called Jenkins Creek on the original plats, I don't know the real name.

(Testimony of Ira M. Flocker.)

Q. Now, my question was directed toward the territory south of Toejam Creek and north and east from that arrow point, on the east end of Opening No. 5.

A. No, sir.

Q. Then that was not a series of rolling hills gradually getting [358] higher to the high mountain 4 or 5 miles away?

A. I have already testified that was a spur from the Toejam Mountain proper; it was gradually getting higher of course; I know that from my knowledge of topography; and because of the fact that it was getting higher, we were unable to see over the first high point, just about the position that I have the barrier placed; between the arrow point on the west and that natural barrier as indicated, there is a low divide, and that was in plain view, the ground rises steep, quite steep on the northeast of that low divide, up to that barrier, the barrier is almost to the top, that is, I mean to the skyline of the ridge, as viewed from that point.

Q. How long is this barrier that you say was over there that you observed?

A. Well, it extended two-thirds of the way across it.

Q. Well, how long was it?

A. I don't know exactly; I have drawn it in there.

Q. I don't care for what is on the drawing; I want your recollection, independent of the drawing.

A. I should say the rock outcrop was exposed two-thirds of the way across.

Q. Well, in miles or half miles, how long was it?

(Testimony of Ira M. Flocker.)

A. Probably a mile and a half.

Q. Without a break?

A. No, sir, I didn't say so.

Q. Then there were breaks in it, were there?

A. From that point it appeared to be broken to the north of the center.

The COURT.—I don't understand that last answer. To the north of the center line of the ridge? It appeared to be broken to the north of the center line? [359]

A. It appeared to be broken to the north of the center line of the ridge.

Mr. LEWERS.—(Q.) Was that the only place there was a break in it?

A. Of course it didn't extend over to Nelson's fence, because the outcrop on the side of the ridge, and the ridge on that side of the fence was a smooth slope.

Q. Did it form a continuous wall?

A. No, sir, I would not testify to that.

Q. Is it a good barrier?

A. I could only testify to that from my knowledge of other barriers.

Q. Answer the question. Is that a good barrier?

Mr. PLATT.—What do you mean, in contemplation of this case?

Mr. LEWERS.—Or in any case. (Q.) Is it not a fact that that is not a good barrier to stop stock?

A. I would not testify that it would stop stock, no, sir, only in places.

Q. Did you observe on any of your visits stock in

(Testimony of Ira M. Flocker.)

any portion of that territory, in the vicinity of this so-called barrier?

A. I don't remember seeing any up there.

Q. Did you see any indication of their having been there?

A. Well, I was not close enough for that.

Q. Then you don't know, in fact, whether or not there are any cattle trails through what you call this barrier? A. No, sir.

Q. And you never took occasion on any of your visits to go over and find out? A. No, sir.

Q. You regarded that barrier as part of the so-called inclosure, did you not? A. Yes, sir.

Q. Now, when you testified that on your visit in July you found this red fence up south of Opening No. A, you didn't mean to testify that it was put up in July, to your knowledge, did you; that [360] is that it had been constructed during July?

A. No, sir, I could only judge by the appearance of the fence, and what Mr. Petrie told me.

Q. Then all you mean to say is that you observed it first in July? A. Yes, sir.

The COURT.—Mr. Lewers, before you leave Toejam Mountain, I wish you would ask him about the relative elevation of the point where he was standing between North's fence and Toejam ridge.

Mr. LEWERS.—I am glad your Honor suggested that. (Q.) Now, will you answer that question in that form, Mr. Flocker, as to the relative elevation between the arrow point at the east end of Opening No. 5, and what you have indicated here as Toejam Mountain barrier?

(Testimony of Ira M. Flocker.)

A. Well, I should judge 500 feet, perhaps more.

Q. In what distance?

A. In the distance of a mile, and a portion of that distance there is a valley between.

Q. How deep a valley?

A. It is a low divide, relatively speaking, in that ridge.

Q. Would that valley be difficult to cross by cattle, or on horseback? A. No, sir, that valley is open.

Q. An easy passage? A. Yes, sir.

Q. Now, did you make any observations or measurements, or take any bearings to determine the distance you were from this so-called barrier; or did you just measure it by your eye?

A. I just measured it by my eye, and my knowledge of topographic form, and at approximately its position with reference to North's fence.

Q. Now, going from the point that I started from in the other question, at the east end of Opening No. 5, and looking toward the northwest end of what you have called the barrier, what is [361] the difference in elevation between those two points, do you know? A. Well, I don't know.

The COURT.—Give us your best judgment?

A. Well, I should say probably 100 feet or 150 feet.

Mr. LEWERS.—(Q.) That is, the northwest end of this barrier would be 150 feet higher than the point I have indicated? A. Approximately, yes.

Mr. DENMAN.—That is the east point of the arrow?

Mr. LEWERS.—Yes, the east point of the arrow.

(Testimony of Ira M. Flocker.)

Q. Now, how much higher is the northwest end of that so-called barrier than the west arrow on Opening No. 5? A. It would be 300 feet.

Q. Then it is lower over there at that corner of Noble's fence than at the east arrow? A. Yes, sir.

Q. Is there not a low or gradual valley in between, leading toward the northeast?

A. In between what?

Q. The two arrow points.

A. No, the summit of the ridge comes between the two arrow points.

Q. Then there is a ridge between, is there?

A. The main ridge between those two extremes, yes, sir.

Q. And that ridge extends on towards the north-east? A. Yes, sir.

Q. Just as Mr. McClellan described it, wasn't it?

A. And as I testified.

Q. Just as Mr. McClellan described it?

A. No, sir, not as Mr. McClellan described it.

Q. Then his description and his statement that this is a gradual rising ridge toward the north and east, is not correct?

A. Not in so far as he said it was a smooth ridge.

Q. But otherwise it is correct, is it? [362]

A. Mr. McClellan's testimony, I don't know as I should testify what I think about his testimony.

The COURT.—No, it is not exactly the right thing to cross-examine him on another witness' testimony. He can testify as to what he saw without testifying as to another witness' testimony.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—I will withdraw that question. Simply as to whether he agreed with the testimony or not.

Q. What was the difference in elevation, the average elevation we will say, about the center of Opening No. 5, and a point about a mile southwest in that general country down there?

A. The center of the point between the two arrows?

Q. Yes, take the average elevation in Opening No. 5, and then go about a mile to the southwest, what I want to get at is the comparative approximate difference in elevation, if any?

A. A mile to the southwest would be about the head of the valley, which opens toward Siawappe Creek to the south.

Q. What is the difference in elevation?

A. Not a great deal, if any difference.

Q. Is it not a fact that standing at the arrow at the east end at the point marked arrow, at the east end of Opening No. 5, and looking toward the southwest, there are rolling hills gradually getting lower as you progress? A. Yes, sir.

Q. And does not that same general average of rolling hills extend on toward the northeast when you turn around and look the other way?

A. No, sir, it is not visible, nothing of that kind is visible from that point. As I testified, there is a low divide between the barrier marked there and that point.

Q. Is anything of that kind visible from any point

(Testimony of Ira M. Flocker.)

in there? A. Toward the northeast? [363]

Q. Yes. A. No, sir.

Q. Take a point between a quarter and a half a mile north of this Opening No. A, the beginning of the Nelson fence, I will ask you if standing in that territory and looking off toward the north and east, you didn't see a series of gently rolling hills, gradually getting higher to the mountain 4 or 5 miles away?

A. You do to the east, south of that stream.

Q. And do you not to the northeast?

A. No, sir.

Q. Did you make that examination?

A. I have looked in that direction, yes, sir.

Q. And when you were at that, or approximately that place, did you look towards the southwest?

A. Yes, sir.

Q. And did you not see a series of gently rolling hills, gradually getting lower toward the southwest?

A. Looking southwesterly from that point, you are looking across the apices of the ridges which are running south toward Willow Creek from the main divide between the two creeks, which, as Mr. McClellan testified, is toward the north, or northerly part; that is, it is closer to Rock Creek than it is to Willow Creek.

Q. That is not an answer to the question. Did you not observe toward the southwest from that point a series of gently rolling hills, gradually getting lower?

A. What I call a rolling hill is generally a portion

(Testimony of Ira M. Flocker.)

of the ridge only.

Q. Will you kindly answer my question. My eye may be trained or untrained, Mr. Flocker, but that is not the issue. I want to know what your trained eye saw.

A. I saw a succession of ridges sloping toward Willow Creek from the main divide, which is closer, as I testified, to the creek above. [364]

Q. Were those sharp ridges, or round rolling ridges?

A. Well, they were rolling ridges, they were not sharp ridges; that is, they are more rolling the further down you get toward the junction of the two streams.

Q. Is there anything that you observed on those ridges that would impede the passage of cattle over them? A. No, sir.

Q. Is there anything you observed on the ridges that you say you could see along to the east of the point I have indicated, to impede the passage of cattle? A. No.

Q. Did you find any shearing corral in the vicinity anywhere of these barriers? A. Yes, sir.

Q. Where? A. I can indicate it for you.

Q. I wish you would.

A. Down on the stream (indicates).

Q. Will you mark that with the letters S. C.? (Witness marks "S. C." on the plat.)

Q. That would be down in the Nelson field, would it? A. Yes, sir.

Q. Were you at that shearing corral?

(Testimony of Ira M. Flocker.)

A. Yes, sir.

Q. Did you observe which way the trails ran from that shearing corral? A. Yes, sir.

Q. Where did they run?

A. I saw a trail running toward the west, down the stream.

Q. Any other direction?

A. I didn't notice, I think it went on east, I didn't notice.

Q. Did you follow that trail toward the west?

A. No, sir.

Q. Do you know where that trail passed through the Nelson fence?

A. I don't know where it passed through, no; I presume it passed through near the cottonwood trees in that opening.

Q. Did any trail run toward the north?

A. I didn't notice any, no, sir. [365]

Q. Did you look for it?

A. No, sir, only in a general way.

Q. Did you look for trails at all?

A. No, sir, only in a general way.

Q. Did you in any of your trips look for trails for the purpose of determining the lines of travel of cattle? A. No, sir, I did not.

Q. Who accompanied you on your first visit?

A. R. F. Haws and H. W. Gray.

Q. Did they go with you across any portion of this territory that you say you went on?

A. Mr. Gray did.

Q. And where did Mr. Haws cross, if he did cross?

(Testimony of Ira M. Flocker.)

A. I don't know where Mr. Haws crossed, he went around, as Mr. Petrie did later, to get around with the buggy.

Q. Did you on that occasion follow on—

Mr. PLATT.—If the Court please, I have not interposed any objection here, because your Honor expressed an interest in hearing what the witness had to say as to the topography of that country, but it does seem to me, it is not necessary to go over all this line of testimony by this examination. If they desire to recall him and make him their own witness, I offer no objection.

Mr. LEWERS.—It is for the purpose of inquiring as to whether he went along the Noble fence. That is all I am after now.

The COURT.—If that is what you want, as to whether he went across the Noble fence, I don't think that is exactly cross-examination here, or proper, but I would like to know what he saw as to the condition of that fence; but if it is drawn out for the purpose of raising a conflict between his testimony and the testimony of any of the other witnesses, as to anything except the exact condition of that fence, I don't care to hear it.

Mr. LEWERS.—It is for the purpose of locating where he went [366] with reference to where somebody else went, to tie the testimony.

The COURT.—Ask the question, and we will know better.

Mr. LEWERS.—(Q.) Did you, either you, or you in company with anyone else on that occasion, go

(Testimony of Ira M. Flocker.)

along the line of what you have marked as the Noble fence? A. I did, I walked along the fence.

Q. And were you alone? A. Yes, sir.

Q. Will you indicate to what point on that Noble fence you walked on that occasion, where you started and where you wound up?

A. I walked along the fence through section 31, in section 32, and took this angle; I didn't take that angle.

Q. By saying you took this angle you mean the angle that turns to the north from the west side of Opening No. 5? A. Yes, sir.

Q. Did you walk up that fence as indicated on your map, towards the north?

A. Not along the fence, walk in a northeasterly direction won't be able to see the fence all along.

Q. How far up did you walk?

A. I should say a quarter of a mile.

Q. And you have indicated on the map Noble's fence a mile and a quarter long, have you not?

A. Yes, sir, making the angle.

Q. Do you know whether that fence goes on further north or not? A. I do not.

Q. And on which visit was it, the first one?

A. Yes, sir.

Q. And did you go along any other portion of that fence on any other of your visits?

A. Mr. Melrose, I think, walked along it.

Q. I am asking what you did, that is all.

A. I don't believe I did, I don't believe I went close enough to observe it on my third visit.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—That is all. [367]

Mr. PLATT.—(Q.) Just a question or two. In response to a question asked by counsel, you stated that you regarded that barrier as a part of the inclosure, and when you answered that question you were referring to the barrier designated upon the plat as Toejam Mountain. Now, I ask you why do you regard that barrier as a part of the inclosure?

A. Because I thought it had a tendency to keep cattle from getting out of the inclosure, or coming into it.

Q. Because it had a tendency to keep cattle from getting out of the inclosure, or coming into it?

A. Yes, sir.

Q. Now, as a matter of fact, Mr. Flocker, beginning right down here in the southwest corner of this plat, and extending in a northeasterly direction through the inclosure, there is a constant rise in the land, isn't there? A. Yes, sir.

Q. Until it extends clear up here in the northeast to a point designated as Toejam Mountain?

A. Yes, sir.

Q. Is not that true? A. Yes, sir.

Q. In other words, the elevation keeps getting higher and higher as you go toward the northeast?

A. Yes, sir.

Q. Now, counsel also asked you as to whether, as a matter of fact, you went upon the barriers, over the Toejam barrier or the two barriers indicated just south upon the plat. Now, why didn't you go upon the barriers themselves, and examine them?

(Testimony of Ira M. Flocker.)

A. Because I could see them from where,—from the point where I did go, and they are usually not very nice things to walk over.

Q. In other words, as I understand it, you can see a mountain or hill or barrier, without walking all over it, can't you? A. Yes, sir.

Mr. PLATT.—I think that is all.

The COURT.—(Q.) I would like you to tell me what the condition of the North fence was the last time you saw it; that was on your [368] third visit, I think.

A. On my third visit there was a place about where I indicate, a little west of the west arrow of the opening, that one or two posts had been taken away, looked as if —they were out, at any rate, one I think was lying on the ground; the wires were down, lying on the ground, one hanging to the top of the post; looked to me as if some stock had broken through.

Q. Well, was it down elsewhere?

A. I don't remember any other place but that one place.

Q. If it had been down would you not have seen it?

A. Not on my last visit, because I didn't walk along it myself, I did the first time.

Q. Did you see it on previous visits? A. Yes.

Q. Now what condition was it in then?

A. Well, it was an old fence, it was in fairly good condition.

Q. The wires down?

A. Only in one place, it was almost down at one

(Testimony of Ira M. Flocker.)

point at the time of my first visit, it would not turn stock, I should say, if they wanted to go through; it was in rather bad condition at that point.

Q. Was it in condition to turn stock at other points? A. Yes, sir.

The COURT.—That is all.

Mr. LEWERS.—(Q.) Do I understand you, when you spoke of the crest of this barrier, that you mark Toejam Mountain as a thousand feet above the general level of the valley, you refer to the level down around say where the Ranch House is?

A. I think I testified that it was 1500 feet above the general level of the valley; a thousand feet above the general levels of the streams up there, approximately in that position on the map; that is, the beds of the streams. [369]

[Testimony of R. E. Tilden, for the Defendant.]

R. E. TILDEN, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is R. E. Tilden, is it?

A. Yes, sir.

Q. And you live in Winnemucca, Nevada, at this time? A. Yes, sir.

Q. What is your occupation?

A. Civil engineer and surveyor.

Q. How long have you followed that occupation?

A. Since 1896.

Q. And where?

(Testimony of R. E. Tilden.)

A. Well, I was first junior engineer in United States Engineers and Surveyors of the Red River and Washita.

Q. Where is that?

A. They are both in Louisiana.

Q. How long were you in that service?

A. Well, from the time I was rodman, including the engineer, and after I left the university, about 5 years.

Q. Of what university are you a graduate?

A. State University of Louisiana, in the Engineering Department.

Mr. PLATT.—We will admit his qualifications, if the Court please, to save time.

Mr. LEWERS.—(Q.) Have you ever made any surveys or examinations of any portion of the territory shown on Government's Exhibit No. 1?

A. Yes, sir.

Q. When did you make those surveys or examinations?

A. Commencing in October, 1910, the latter portion of October.

Q. And extending to what time?

A. To December, 1911.

Q. And have you been on the ground at any time since that? A. This year.

Q. I do not mean for the purpose of making a survey, have you [370] been on the ground at all?

A. Yes, sir.

Q. When was that?

A. About two weeks ago, I should think.

(Testimony of R. E. Tilden.)

Q. In whose company generally, did you go on that occasion?

A. Mr. Petrie, Mr. Lamb, Mr. Sheehan, Mr. Lewers.

Q. That is the automobile party that has been referred to, is it? A. Yes, sir.

Q. Now have you made any examination of Exhibit No. 1, as it appears here on the board?

A. Yes, sir.

Q. I will ask you whether or not you have made any tracing of any portion of that?

A. I have the east and northeast portions.

Q. And that tracing you say was made from this exhibit itself? A. Yes, sir.

Q. I show you a paper here, and will ask you if that is the tracing that you refer to? A. Yes, sir.

Q. Now does that map or tracing contain on it anything in addition to what appears on Exhibit No. 1? A. Yes, sir.

Mr. PLATT.—Well, I object; I didn't have a chance to object, if the Court please, before the answer was in, but I ask that the answer be stricken out, on the ground that the tracing itself is the best evidence as to whether it contains anything more than this tracing.

The COURT.—That is true, but he can go on.

Mr. PLATT.—I suppose this is going to be put in evidence; and if it is introduced in evidence, it is the best evidence.

The COURT.—It will have to show something about its accuracy before it is admitted, and I pre-

(Testimony of R. E. Tilden.)

sume it will be admitted and taken for what it is worth, just as the other exhibits are, but before it is admitted, you will have an opportunity to cross-question him. The contents of the map, of course the matter should show for itself, the witness testifies as to its accuracy. [371]

Mr. LEWERS.—The only purpose, the testimony indicating already it was a tracing, was to show wherein the difference was, between the two, as preliminary to its use, that was all. I did not want it to appear that this was represented to be a true tracing in all respects; it was merely a preliminary question.

Q. From what source did you obtain anything that appears here, in addition to the tracing of Exhibit No. 1?

A. From actual field-notes and surveys.

Q. Made by whom?

A. Me, assisted with rodmen.

Q. Now, will you examine that tracing, and I will ask you whether or not those things which are represented on there in addition to what appears on Exhibit No. 1, are correct representations of your own observations taken on the ground?

A. Well, you have on here an irregular piece of ground called Toejam.

Q. Notice the question: In addition to what appears on Exhibit No. 1; that is, those matters on that plat, in addition to what appears on Exhibit No. 1, are they based on your actual observation, and are they correct representations of what you observed

(Testimony of R. E. Tilden.)

on the ground? A. Yes, sir.

Q. Now what portion of Exhibit No. 1 does this tracing cover, generally?

A. The east part and northeast part.

Q. By whom was this drawing made?

A. By me.

Mr. LEWERS.—We offer this in evidence for the purpose of illustrating the testimony.

Mr. PLATT.—Well, if the Court please, I will have to object to it at this time upon the ground there is no testimony to show what the exhibit represents. The witness was interrogated as to whether that exhibit represents in addition to what is shown upon Exhibit No. 1, is a correct exhibit. Now there is no question, [372] and no testimony here showing whether that exhibit offered in evidence represents anything more than those things, in addition to that plat. The inference is, if the Court please, that it represents some of the things upon that plat, the Government exhibit, and some things in addition to that. Now, counsel has only offered in evidence such portions, and only laid the foundation for the offer of such portions of this exhibit, as are additional to the Government's exhibit; and it is impossible for me to determine, and I think the Court too, as to whether that exhibit purports to represent additional things to the Government exhibit, or whether it purports to represent similar things and additional things.

The COURT.—Your objection is that it represents portions of your map, and some things that are not on your map?

(Testimony of R. E. Tilden.)

Mr. PLATT.—Yes.

The COURT.—And that you offer to vouch for the correctness of it, in so far as it is not a copy of your map, is that it?

Mr. LEWERS.—That is my offer.

The COURT.—You don't vouch for its correctness in so far as it is a copy of the map on the board, except that it is a correct copy?

Mr. LEWERS.—That is all.

Mr. PLATT.—As I understand it, there is no testimony showing that that is a correct copy of the plat upon the board.

Mr. LEWERS.—Oh, yes, there is, Mr. Platt.

Mr. PLATT.—Well, if there is I have not heard it. The record is silent as to whether this exhibit is a correct copy of that exhibit.

The COURT.—(Q.) Is that exhibit a correct copy of the exhibit on the board?

A. The portion I have drawn. [373]

Mr. PLATT.—If I may be permitted to ask a question.

Q. Does this exhibit purport to be a copy of the Government's exhibit?

A. Of that portion that has been copied.

Q. What portion?

A. East and northeast portion that is shown.

Mr. LEWERS.—The barrier portion, you mean?

Mr. PLATT.—(Q.) Is it an exact copy of that exhibit?

A. Yes, sir, as near as I could draw it.

Q. Then as I understand it, you testify that this

(Testimony of R. E. Tilden.)

is an exact copy, correct in every detail?

A. As near as I can draw it.

Q. And that it is based upon an actual survey?

A. The part that I did; not the part on here.

Q. Do I understand your testimony to be that the part which you copied of the Government's exhibit you actually surveyed?

A. No, sir, I didn't survey the Government's exhibit.

Q. Did you survey the land represented by the Government's exhibit?

A. A part of it, in that vicinity. There is part drawn on there that I never touched.

Q. Then this map is not a complete representation of the Government's exhibit, is it?

Mr. LEWERS.—We concede it is not.

Mr. PLATT.—(Q.) Now do you testify that all of the delineations upon this exhibit, or upon this plat offered in evidence, are based upon actual survey?

A. The part that I did.

Q. Just the part that you did?

A. Yes, sir. I don't know what the other man did.

Q. Is there any indication upon this offer of the part copied and of the part of it which you made an actual survey of? A. Repeat the question.

Q. Is there any indication upon this offer of the portion of the Government's exhibit copied, and the part that you actually [374] surveyed?

Mr. LEWERS.—We submit that the exhibit offered will speak for itself. I will explain, if you will pardon the interruption. So far as the lines,

(Testimony of R. E. Tilden.)

fence lines, section lines—

WITNESS.—(Intg.) That is Government work, and some streams there.

Q. Just a moment. The notations Toejam Mountain, and the other barrier, alleged barrier, that differs in no respect from the Exhibit No. 1, but the difference comes in certain elevations, notations as to openings in fence, position of stream, and contour of the ground.

Mr. PLATT.—The only difficulty is, if the Court please, it seems to me that an actual survey has been made of a portion, and an actual survey has not been made of another portion; and it is not clear in my mind just what portion has been actually surveyed, and what portion has not.

Mr. LEWERS.—Permit a question there, and we can straighten that out.

Q. You have actually surveyed, have you not, Mr. Tilden, the northeast portion of that alleged inclosure appearing on Exhibit No. 1? A. Yes, sir.

Q. And you have actually surveyed over the ground depicted in this tracing we are now offering in evidence?

A. As to what the Government represents.

Q. That is, in addition to what is represented on the Government plat, you have been over the ground, have you?

A. And except some section lines, and some streams way out, I never went there, that was taken from U. S. Government notes.

Mr. PLATT.—I think we can save time: I will

(Testimony of R. E. Tilden.)

ask leave to interpose an objection afterwards, without waiving my right, after [375] it has been made clear to me just what portion of that plat represents an actual survey, and just what portion does not.

The COURT.—The plat will be admitted subject to the objection, and you can cross question him regarding the particular parts of that map which he actually delineated from surveys of his own.

(Map admitted in evidence and marked Defendant's Exhibit "A.")

Mr. LEWERS.—I will state so counsel and the Court may understand it, our purpose in offering it this way is to have it on exactly the same scale as the other map, for more convenient reference. We had other maps, which, as your Honor may remember, covered far larger territory, that were, by the evidence in this case, excluded, that is, by the rulings, and we have therefore placed it on exactly the same scale position as the other map.

Q. Now, Mr. Tilden, I call your attention to Defendant's Exhibit "A," and ask you to point out on that exhibit generally those portions which correspond and are tracings of Government's Exhibit No. 1.

A. The fence line from the northeast corner of section 32, township 40 north, range 49 east, to the southwesterly direction to an angle; then southerly to the section line between 31, 6, 5, and 32; thence northwesterly to near the west quarter corner of section 31, township 40 north, range 49 east, continu-

(Testimony of R. E. Tilden.)

ing in the same direction for about three-quarters of a mile, also in a general westerly direction through sections 36, 35, 34, 37, township 40 north, range 48 east.

Q. Now, I will ask you—if I may be permitted a leading question—whether or not the fence lines indicated on this tracing correspond in position to the fence lines indicated on Exhibit No. 1?

A. All except from the northeast corner of section 32, around in a northeasterly and easterly and northerly direction, to the end of the fence. [376]

Q. That is, you have at that point extended the North or Noble fence toward the north and northeast, is that correct? A. To the end of it.

Q. Is that extension based on any actual observation or surveys of your own?

A. Actual surveys and measurements made by me and rodmen in November and December, 1911.

Mr. PLATT.—Just a moment. You say that survey was made in November and December, 1911?

A. Yes, sir. Made, not very much in December, but the latter portion of November.

Q. Do you know, as a matter of fact, whether the condition of the fence in November—

The COURT.—I don't believe you had better interrupt.

Mr. PLATT.—It was just laying the foundation for an objection, if the Court please. Your Honor will recognize from the answer that survey was made long after this suit was brought.

Mr. LEWERS.—That goes to the weight rather

(Testimony of R. E. Tilden.)

than the relevancy.

The COURT.—Conceding it is, I shall admit it for what it is worth, anyway. You can have the exception.

Mr. PLATT.—The objection I was going to offer was, it is not shown the fence line was in the same position at the time the survey was made, that it was prior to the beginning of the suit, or at the time.

Mr. LEWERS.—(Q.) How old was that fence, that you observed there, what was its appearance?

A. Its appearance, the wires were very rusty, the wires were cut in many places, and I examined the ends of the wires, which were very rusty, showing it was a very old fence; posts down in many places; the gates were all down; and from the general appearance of the fence, the posts being rotten, it was somewhere about 15 or 20 years old.

Q. I call your attention to the portion of Exhibit "A" marked "Tojam Mountain," as shown on Exhibit 1 of plaintiff, is that [377] portion a tracing of Exhibit No. 1? A. Yes, sir.

Q. And I also call attention down in section 4, leading into section 9, another tracing of a portion of the barrier, and ask you if that is a tracing of the one that appears, substantial tracing, of the one that appears on exhibit No. 1? A. Yes, sir.

Q. Is either this so-called barrier up here marked "Toejam Mountain," as shown on Exhibit No. 1, and the other one below, based on an actual survey or observation of your own, or based on Exhibit No. 1?

A. Based on Exhibit 1.

(Testimony of R. E. Tilden.)

Q. Now I call your attention to certain streams and creeks represented on Exhibit "A"; where did you get those as they appear?

A. Well, from this point—

Q. What is "this point"?

A. Well, the point beginning at the east end of the reservoir.

Q. Willow Creek reservoir?

A. Willow Creek reservoir, in township—it don't show on this one, nor does it on this one, but I can tell you what township it is, township 39 north, range 49 east.

Q. Go ahead.

A. And continuing in an easterly and northerly direction to the junction, to a point below the junction where Nelson's fence crosses Siawappe Creek, from there on these creeks were taken from Government surveys of the township maps.

Q. And how as to the creek marked "Tojam Creek" to the north?

A. It was surveyed by me continually from the junction where it joins Rock Creek, in section 31, township 40 north, range 48 east, in an easterly direction, through the sections as shown on the map, and in a northeasterly direction, and to a point a half to three-quarters of a mile; I don't know what section that is, east of where the Nelson fence turns north.

Q. Nelson's fence? [378]

A. Or Noble's fence turns north.

Q. And from there on, where did you get it?

A. That was taken off township maps.

(Testimony of R. E. Tilden.)

Q. Now, I call your attention to certain designations, such as Nelson's fence, Opening No. A, 300 feet opening at new fence; those were taken from Exhibit No. 1, were they not? A. Exhibit 1.

Q. And the words "Opening No. 5, North's fence to Noble's fence" were also taken from Exhibit No. 1, were they not? A. Yes, sir.

Q. And when the correction was made changing the word Noble's to Nelson's, you also made the same correction on this Exhibit? A. Yes, sir.

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

R. E. TILDEN, continuing in direct examination.

Mr. LEWERS.—(Q.) Mr. Tilden, first without reference to the map, but from your recollection of the ground, will you state in as short form as you can just where you went after you left the opening in the fence to the east of the Willow Creek Reservoir; that is, from the time that you got on horseback, the last time you were over there.

A. Well, we followed around the road, up the east bank of Willow Creek, going in a northerly direction, and crossed at the Siawappe Corrals, where Willow Creek and Siawappe Creek join, from there we climbed the little ridge, and rode along the fence line in a northerly direction, along this ridge, to where the fence turns, [379] I can't see the section there, where the little right angle turns to the right, and then follows up the same Siawappe Creek, going right as close to the fence as we could ride, ten feet, I suppose, until we got to a little place

(Testimony of R. E. Tilden.)

where a spring comes in, or where the road winds around the hill from Willow Creek proper to Siawappe Creek, where our wagon went during the survey, where we hauled our supplies; then we crossed through the fence there; I led the party there, knowing the road.

Q. How did you cross, through the fence?

A. Rode right through it, an opening there.

Q. Go ahead.

A. Then we rode up to the west side of the fence, or west side of Siawappe Creek.

Q. Whose fence or what fence are you referring to now?

A. Well, I would not know whose fence it was; they say it is the Golconda Cattle Company's, in section 17, whatever the township is, township 39. Then in going on up we stopped at a place where the telephone line crosses, which does not show, those maps did not put it on there, and discussed the map we had in our possession; and I showed them the different openings and the gate just a little above me, above the telephone line, where our wagon had driven through going across from Siawappe Creek to Toejam Creek.

Q. Never mind what was said.

A. Then from the telephone line we continued our ride in a northerly direction until we came to the clump of trees, or where there is a space of 300 feet between the end of the fence and what is called Nelson's fence. I don't know who built the fence, in section 8, and from there we looked at the different

(Testimony of R. E. Tilden.)

hills, and drew a slight sketch of the hills on the opposite side of the creek. We also looked down Nelson's fence which ran up a long ravine, and I suppose we could see Nelson's fence for at least a mile and a half, running [380] in a northeasterly direction, slightly northeast, about 10 degrees, I suppose, right along the west side of the fence line, until we got to a point about half way the length of this fence, then we circled around the ridge, the low ridge in there, where we rode our horses around, until we came upon the crest of the summit; from there I pointed out the corner of Nelson's fence, and showed them the direction that I ran the lines. From this point, the snow being too deep, we continued our journey in a northwesterly direction, coming off of this summit onto the bank of Toejam Creek, passing through an opening 312 feet wide; the fence was down lying on the ground.

Q. What fence?

A. Noble's fence, the North fence, as you may call it on there; the fence was lying on the ground, we just rode right through the opening, from this point I directed the attention of the party to the long valley up Toejam Creek. Mr. Lewers asked me if cattle from—

Mr. PLATT.—Object to any conversation.

Mr. LEWERS.—I just want to know what was done.

A. From this point I directed the party's attention to the opening in a deep ravine, not a very deep ravine, say 60 feet deep, below the left top bank of

(Testimony of R. E. Tilden.)

Toejam Creek, where there had been an old gate, and where the fence was down for at least 500 feet, might be more than that, might be wires just hanging on there for more than that distance; some posts were up and some posts were down, but there was evidence of an old gate there which I saw during the survey. We then continued our journey in a westerly direction on the inside of the fence, or next to the Toejam Creek; I pointed out the openings along the line. The next point we came to was an opening, which I think appears a little east of the section line, I cannot see what it is here.

Q. Leave the designation of the openings for the present, and [381] just proceed to tell where you went.

A. That is where I went. We continued the journey on the inside of the fence for about three-quarters of a mile, till we crossed the fence again through an opening, the fence was down, rode right through; then continued the journey on a still westerly direction, we came to where what is called, so-called Golconda Cattle Company's fence and Noble's fence junction, or where Noble's fence turns in a northwesterly direction; then continuing on along the inside of the fence after we passed through this opening, passing along the creek, and climbing a slight raise, 10 feet high, on the inside of the fence, and we passed on down for at least two miles, and passed out of this fence, going on the outside of Toejam Creek, passing through a gate, a regular road through there, wagon-road; thence going still fur-

(Testimony of R. E. Tilden.)

ther west on our journey, we passed on the outside of the fence, till we came to an opening 503 feet wide, or at the upper end of a small field, called the Toejam field; this field had been cultivated and sowed, it had been recently plowed; this field also had two gates at the east end of it. Passing through this field—

Q. By the way, were any of those gates closed at that time?

A. No, sir, nor were they closed when we made the survey. Passing through this field, we endeavored to get out, going a little past the gate, we came back and passed through another gate; thence going still westerly in the same direction, keeping on the outside of the fence, we met the automobile at the junction or a little below the junction of where Toejam and Rock Creek joins, at this point there was another opening 95 feet wide.

Q. Now, will you step down here, Mr. Tilden, and with this short pointer, standing back so that the Court may see, indicate on Exhibit "A" where you went on that occasion that you have now described. Indicate the course that you followed. [332]

A. Which, with the horses or automobile?

Q. With the horses.

A. We caught the horses somewhere, I think, between this opening, halfway between this opening in section 31.

Q. Is that the opening denominated as Opening No. 6? A. Yes, sir, Opening No. 6.

Q. What is the size of that opening?

(Testimony of R. E. Tilden.)

A. Three thousand four hundred feet wide, between corner of fence and corner of fence.

Q. Now, proceed from that opening.

A. Thence we just followed outside of the fence till we came to this junction of creeks, right here, which is called Siawappe Corral, is on this, that junction of the creeks in here, this is the main creek on this side, and this is the old slough on this side, and following on up to this point, we cut across this little hill right here, the fence goes down and goes underneath the hill; we didn't follow that.

Q. On what section? A. Section 20.

Q. Proceed rapidly.

A. And then following in a northerly direction we went down the hill, and crossed the creek here, then crossed an opening right through here.

Q. In what section?

A. Section 17, southeast quarter of section 17, in township—

Q. It is only section 17 on the map?

A. Section 17, thence rode up the west side of this fence, and stopped at the telephone line here.

Q. Will you indicate on that plat where the telephone line is?

A. I think the telephone line I have got a little bit too high as near as I can understand, I don't remember exactly.

Q. Will you mark that with the word "Telephone"?

(The witness marks the point on the map.) [383]

Q. Now proceed, rapidly indicating.

(Testimony of R. E. Tilden.)

A. From that went on up to the top of this grove of trees right in here, right where the junction of this fence joins Nelson's fence.

Q. Is that Opening No. A?

A. That is Opening No. A, about 300 feet wide; thence we continued on to the west side of this fence here called Nelson's fence, and began to diverge to a point about halfway, this fence turned a little up to the northwest, and followed around a ridge, riding on top of this ridge, and going across to a point about this place.

Q. Where is "this place" with reference to section 5?
A. Northeast quarter of section 5.

Q. And which corner of the Nelson fence that you rode toward?

A. Which corner did I ride toward?

Q. Yes, and point it out.

A. That is the one I called your attention to.

Q. That is the one at the east side of Opening No. 5, where the arrow points, is it not?
A. Yes.

Q. Then where did you go?

A. Thence rode in a slightly northwesterly direction, more westerly than northerly, to a point indicated by "312 foot opening" west of the corner, in the northwest quarter of section 5.

Q. And how is that indicated on Exhibit No. 1?

A. That is about right here.

Q. That is the west arrow at Opening No. 5, is it not?

A. At Opening No. 5, near the west arrow. And thence we passed through this opening, and rode on

(Testimony of R. E. Tilden.)

down, crossing the fence at the point about here, 90 feet wide, crossing the fence along here.

Q. In which section? A. Section 31.

Q. Towards what part of the section?

A. South half of the section. Thence rode on the outside of the fence, till we got [384] to this point, the junction of the so-called Golconda Cattle Company fence and Noble's fence.

Q. That is at the township line, is it not?

A. Not township line, but range line, and north of the township line; thence rode right through this fence here, never opened a gate, passed on down to a point about the middle of section 36.

Q. In the next township?

A. In the next township, township 40 north, range 48 east. Right at this point we crossed the creek, following in an old road, running right along here to some point in along the west half of section 35; we found a gate, the gate was down, and we passed through. Then following on the outside of the fence to some point about section 34, I think it is called, saw an opening there, and a field on this side.

Q. Which side?

A. I suppose from the looks of this map, the field would be on the inside, the field would be on the south side.

Q. Proceed.

A. Thence we passed through two gates in this little field, and rode through the field, and passing out of another gate, went on down to the junction of Rock Creek.

(Testimony of R. E. Tilden.)

Mr. LEWERS.—Now, if the Court please, Mr. Tilden was called for the purpose of identifying and explaining this map, and explaining where he went at this time, and we ask permission to withdraw him at this time, and put Mr. Sheehan on again, it being understood that you can cross-examine now if you desire, or that you can reserve your cross-examination of the whole matter until we put Mr. Tilden on again, which we will.

Mr. PLATT.—I think while on this subject, and while everything is fresh in our minds, it might be more advantageous to everybody to permit a cross-examination now, and I think it will expedite my cross-examination. [385]

Cross-examination.

Mr. PLATT.—(Q.) As I understand, you noticed gaps and openings about which you testified, on this last automobile trip that you made? A. Yes, sir.

Q. Do you remember what time of the day it was that you arrived in the automobile, say at this Midas road?

A. Midas road, we went there the day before, about 3 o'clock in the evening, I think; I can give you the date by looking at my book, if you want it.

Q. What time did you start out in the morning of that day to make that tour along that fence?

A. About 8 o'clock.

Q. In the morning; and when did you get back?

A. We got back,—we never came back to Dutton any more at all, just went on to Golconda, passed Golconda about 10 minutes to 3.

(Testimony of R. E. Tilden.)

Q. When did you leave the inclosure that day; what time of the day did you leave this country, the vicinity of that fence? A. What point?

Q. The extreme western point.

A. Just opposite Dutton Ranch, I would say, for Golconda, 10 minutes to 3, I would say.

Q. In order to make the circle of that fence, as you have described it, you left at 8 o'clock in the morning, and finished somewhere around 3 o'clock in the afternoon, is that approximately correct?

A. Yes, we passed the Dutton Ranch at 10 minutes to 3.

Q. You finished before that, didn't you?

A. We finished riding around the fences, I think, about half-past one.

Q. Now, just where, designating upon either plat, did you leave your automobile and take to the horses?

A. We left the automobile in section 31, township 39 north, range 49 east, at the opening which you call Opening No. 6; I suppose [386] somewhere in about that point.

Q. That is between, midway in the opening?

A. Midway along the road, or might have been a little closer to the east side of the road than the west side.

Q. What did you take horses for there?

A. To ride around over the line.

Q. Was it impractical to take the automobile, or ride in it further on?

A. No, sir, we could have driven this automobile

(Testimony of R. E. Tilden.)

around the road up to this point.

Mr. LEWERS.—What point?

A. Up to the northeast quarter of section 29.

Mr. PLATT.—(Q.) That is, as I understand it, the road within the black line fence and inclosure?

A. Yes, sir. From what I understand by the wagon road—

Q. I don't care anything about your understanding, not desiring to be too—

Mr. LEWERS.—Pardon the interruption, Mr. Platt; you refer to the black line fence; it is not your contention that there was any black line fence there at that time, is it? A. No, sir.

Mr. PLATT.—I said, referring to the road within the black line fence, as indicated upon the plat, that is what I mean.

A. That road ran near the red line fence.

Mr. PLATT.—Of course it is our contention that this red line fence afterwards superseded that, and the road ran on the outside.

Mr. LEWERS.—That is what I understand.

Mr. PLATT.—(Q.) Now, what is the general condition of the country southeast of this Opening No. 6? You spoke about riding around some hills there?

A. Southeast of Opening No. 6?

Q. Yes.

A. I ran some lines out there once, and you go from 1320 feet, with very slight rise, then about a 15 foot on, and [387] then you get on a level mesa, and then I suppose for 3 or 4 miles back it was just a regular rise, maybe 4 per cent rise.

(Testimony of R. E. Tilden.)

Q. What hills did you ride around in that neighborhood?

A. We followed the fence line continuously around, stopping at the trees.

Q. Didn't you testify that you made a circuit in and around this section, around some hills, before you took to the fence again?

A. No, sir, followed the fence line; we followed the red line fence—well, this hill I had reference to didn't go over 600 feet away from the fence any time.

Q. Did you go around a hill anywhere?

A. Cut across this way, from this point to this point.

Q. What is "this point"?

A. Northwest quarter of the northeast quarter of section 20.

Q. Then you say you crossed the Nelson fence shortly after that?

A. No, sir, crossed what is called Golconda Cattle Company fence.

Q. Where did you cross that?

A. This point right here.

Q. Why did you cross it there?

A. Well, there was an opening in the fence there.

Q. Where was the opening?

A. Almost right opposite this point right here.

Q. What kind of an opening was it?

A. The wires were down, 30 feet wide.

Q. Do you know when the opening was put there?

A. I don't know, they were there when I made a survey.

(Testimony of R. E. Tilden.)

Q. Why did you cross on the inside of that fence through that opening instead of staying on the outside?

A. Well, there is a road on the creek side, and there was a good deal of snow on the ground, and you could get a better view from this side, because the ground was high.

Q. Now, you have indicated here upon your own plat something which [388] to me would indicate hills or mountains; what does it indicate?

A. That represents your symbol.

Q. Is there anything justifying a symbol such as is represented upon that plat?

A. I never saw anything.

Q. Saw nothing? A. No.

Q. Do you testify absolutely that is level country there? A. No, sir.

Q. What kind of country is it?

A. Undulating.

Q. Is there anything in the topographical condition of the country which would justify a symbol such as is indicated upon both plats?

A. Not as I know of.

Q. I asked you whether the country was level there or not? A. No, sir.

Q. What kind of country is it?

A. Undulating.

Q. What do you mean by undulating country?

A. Up and down.

Q. How high were any of the ups, or hills?

A. I suppose you would go down one valley and up

(Testimony of R. E. Tilden.)

the next ridge, 30 feet from the top of one to the bottom of the other.

Q. You say the extreme height of any of those undulations or hills was 30 feet?

A. On that side of the creek it would be.

Q. How on the other side of the creek?

A. There was a little rocky knoll right in between the two creeks here—I beg your pardon—it was along this way, inside of the fence, and there was another one up a little piece further, with the ravine running up between them.

Q. In which direction was that ravine trending?

A. Running in a southwesterly direction toward the creek.

Q. Now upon the plat marked Government's Exhibit No. 1, and upon your plat, Defendant's Exhibit "A," are indicated symbols, [389] which have been described in the legend of the Government's exhibit as being a natural barrier; is there anything in that section of country to justify a symbol such as that?

Mr. LEWERS.—I desire to object to that on the ground it is not cross-examination, because that is one of the matters I expect to go into very fully with this witness, and I refrained at this time for the purpose of saving time, and the objection of course will not preclude cross-examination on that point. I merely suggest it at this time.

Mr. PLATT.—I don't think the witness was asked about that in direct examination. I withdraw the question.

(Testimony of R. E. Tilden.)

Q. Now, have you compared generally the course and outline of the fences represented upon the Government plat with your own surveys, and with this particular plat known as Defendant's Exhibit "A," with a view of ascertaining as to the accuracy of the plat, the Government's plat, as to the course and trend of the fence lines, and their actual location?

A. I have compared what is shown on this plat.

Q. Now, is the Government's plat, in so far as the comparison you have made, approximately accurate?

Mr. DENMAN.—On the fences, Mr. Platt?

Mr. PLATT.—Yes.

A. As far as they represent not showing any openings; they don't show any openings, we do.

Q. I wish you would indicate the openings upon your plat which are not indicated upon the Government's plat.

Mr. LEWERS.—I would suggest in that connection, although the witness did refer to openings, I did not follow that up, and that is another matter I was going into in detail.

The COURT.—You may go on.

Mr. PLATT.—(Q.) You testified, didn't you, as to certain openings [390] in a fence somewhere along the northern extremity of the fence line; now, as a matter of fact, were not those openings in a fence, not delineated upon this plat at all; were not they openings in a fence in that private field adjoining the fence line as indicated upon the plat?

A. What do you mean by private field, Golconda Cattle Company or somebody else?

(Testimony of R. E. Tilden.)

Q. Either Golconda Cattle Company or somebody else, extending further to the north of the fence line.

A. Well, there were openings also in what you have shown there, and only gates in that private field.

Q. Then as I understand it, in the private field there were gates that you noticed?

A. Three gates.

Q. Three gates in the private field, extending further to the north from the north line fence, as indicated on the plat?

A. No, you have the south fence shown on here approximately correct, and one of the gates is in that south fence.

Q. Do I understand you to say there is another gate directly in that fence along its north line, as shown upon the plat?

A. No, sir, they are cross fences.

Q. What do you mean by cross fences?

A. May I draw it on the board?

Q. Yes.

(Witness draws on blackboard.)

A. There is a gate there and a gate here; now this is the fence that you show approximately on your line here; you come down that direction, and come down here somewhere; I would judge that your map shows coming down on the south fence, coming down here, around this way; that is a gate, and that is a gate.

Q. Well now, let me be brief about this and direct your attention to what I want. I call your attention to the Government's Exhibit, and particularly to the

(Testimony of R. E. Tilden.)

line between Opening No. 4 and Opening B.

A. There was one gate— [391]

Q. Just a moment. (Contg.) And I will ask you whether upon that fence line as indicated upon that plat there is a gate which should be placed upon that plat?

A. I could not tell by your fence how close your fence was drawn; your fence was drawn through the middle of the section, and so is this drawn through the middle of the section, so I could not understand.

Q. Let me ask you again, is the fence of the Golconda Cattle Company as to the distance from Opening No. 4 and Opening B correctly represented upon the Government plat?

A. I should not think it was.

Q. Well, why isn't it?

A. It is not drawn correctly.

Q. Well, how should it be drawn?

A. That map we have not exhibited yet.

Q. As a matter of fact, isn't there a fence belonging to the Golconda Cattle Company, directly connecting Opening No. 4 with Opening B?

Mr. DENMAN.—Mr. Platt, we will admit that your map is substantially correct at that point.

A. Yes, I should think so.

Mr. PLATT.—(Q.) There is, isn't there?

A. Yes.

Q. Now, then, that fence line as shown on that plat, is there a gate or an opening?

A. There is a gate on the south fence line there, I would not say whether it is on yours or not, but we

(Testimony of R. E. Tilden.)

passed through a gate on the south fence line, and these fences were continuous.

Q. You are not in a position to state then whether there should be a gate indicated on that plat within the points I have mentioned?

A. Not on your plat, no, sir.

Mr. PLATT.—It is just with a view of ascertaining what the fact is; our contention will not be that gates cut any material [392] difference, but I desire to get the facts, if I can.

Q. Now do you know from your examination whether Opening No. 4, Opening No. B, Opening No. 3 were actually openings in that line of fence made after the month of July, 1911, or not?

A. This opening was in December, 1910.

Q. That is Opening No. 4?

A. Yes. This opening was in December or November, 1910, I don't know which month.

Q. That is Opening No. 3?

A. That is all you asked, is it not?

Q. How far to Opening B?

A. I never went that far until last year.

Q. These are the only two openings then to which you can testify in response to the question about which I asked? A. Yes.

The COURT.—That is Opening 3 and Opening 4?

Mr. PLATT.—Openings 3 and 4. (Q.) Now, what was Opening No. 4?

A. Opening No. 4 was a wide gate 95 feet wide, or such, kind of a Mormon gate they call them, a wire gate.

(Testimony of R. E. Tilden.)

Q. What is Opening No. 3?

A. Wires were down and a gap in the fence 30 feet wide.

Q. Thirty feet gap.

A. As near as I remember; during that time I never paid any attention to that, just saw it there and drove through it, that is all.

Q. As a matter of fact, you paid no attention to any gaps, did you, until you made your last visit in the automobile and with horses?

A. Oh, yes. This sheep road there, we have it on my map as sheep road, showing the openings, lots of things we have that is not on that.

Q. But as I understand your testimony, you paid no attention to these other gaps on top here at your other visits? A. No, sir.

Q. So you are only able to testify concerning these other gaps [393] as a result of your third visit, made a month or so ago?

Mr. DENMAN.—I object. Your question does not show what is meant by “the other gaps.”

Mr. PLATT.—Well, Opening No. 3, Opening No. 4 and Opening No. 5.

Mr. DENMAN.—Now, if the witness understands. Repeat the question.

Mr. PLATT.—(Q.) You paid no particular attention, as I understand your testimony, to the gaps represented on the Government plat, as Opening No. 3, Opening No. 4, Opening No. 5, and Opening B?

A. You mean from B. on around? I paid no attention to these I said in 1910.

(Testimony of R. E. Tilden.)

Q. Well, what gaps didn't you pay any attention to till your last trip?

A. I wasn't up there, I could not pay any attention to them, wasn't around there until November, 1911. From this point, from Opening No. 6, around to the, well, about half or three-quarters of a mile east of Rock Creek and Toejam Creek, I have never been until 1911.

Q. What month of 1911? A. November.

Q. November, 1911. Then all of the distance you have just indicated you never observed until November, 1911? A. No, sir.

The COURT.—(Q.) Do I understand you did not observe any openings between Opening No. 6 and Opening No. 4, going around on the east side, until November, 1911?

A. No, sir, I saw a great many openings in that space, quite a number of openings.

Q. What is it that you did not observe until November, 1911?

A. From a point in section 31 to a northerly direction, then it is in a westerly direction to about three-quarters of a mile east of the junction of Toejam Mountain.

Q. You did not observe the openings there until November, 1911? A. No, sir. [394]

Mr. DENMAN.—(Q.) You didn't go there until that time?

A. No, sir, wasn't up there, didn't go there until that time.

Mr. PLATT.—(Q.) Well, if you were not there

(Testimony of R. E. Tilden.)

you could not have noticed them, could you?

A. Certainly could not.

Mr. PLATT.—I think that is all, I understand this witness will be called again?

Mr. LEWERS.—Oh, yes, and we will go into the matter of these openings, as well as other matters. Call Mr. Sheehan. [395]

**[Testimony of J. Sheehan, for the Defendant
(Resumed).]**

J. SHEEHAN, direct examination resumed.

Mr. LEWERS.—(Q.) Mr. Sheehan, if you will step this way I will call your attention to Defendant's Exhibit "A," and also to Government's Exhibit No. 1, but first to Exhibit "A." The creek I point out here indicated on the map is Willow Creek, joining there with Siawappe Creek, and running to the north of this creek, here is Toejam Creek, and I call your attention to a red line indicating a fence, finishing up with a black line below and marked Nelson's fence, also to a point marked Opening No. 5, North's fence to Nelson's fence, 1¼ miles, and also to—I refer to Exhibit 1—a long, undulating snake-like object, marked Toejam Mountain. Now, are you able to identify your position with reference to the time you made a visit to that Squaw Valley country?

A. I am.

Q. Where is it that you started on the horseback trip on that occasion? Will you take this pointer and indicate on the map, and describe the spot?

A. We took our horses about at this point.

Q. That would be?

(Testimony of J. Sheehan.)

A. There is the point, about the end of this fence here (indicating); and it was about here on this map (indicating on Defendant's Exhibit "A").

Mr. PLATT.—Now, will you just make a star at the end of that fence there, and mark that.

Mr. LEWERS.—You will have an opportunity to examine the witness.

A. Do you want this marked too?

Mr. PLATT.—Yes, if you please.

(Witness marks points on maps.)

A. Judging the position from the reservoir, it is about here.

Mr. LEWERS.—(Q.) Now, will you describe the topography of that country at the place where you took the horses? [396]

A. The place we took the horses was in a canyon, a flat, wide canyon, that is, with the other canyons coming in there, made a wide place at the point where we took the horses.

Q. Then where did you go?

A. Then we followed along the line of this fence, off in this direction.

Q. In which direction generally?

A. In a northerly direction.

Q. Along what creek indicated on the map?

A. Siawappe Creek.

Q. Now, you have already testified something concerning some cottonwood trees, or a clump of trees; where was that?

A. That was at about the beginning of the Nelson fence, or the end of the Golconda Cattle Company's

(Testimony of J. Sheehan.)

fence, about in this place (indicating).

Q. State whether or not that is the place marked Opening No. A.

A. That line indicates the opening here; yes, sir, that is the point.

Q. Now, from there where did you proceed?

A. We then followed along the line of this fence.

Q. Which fence is that?

A. This is a new fence of Nelson's, to a point about here.

Q. Indicating a point in the northwest quarter of section 4?

A. We did not go quite to the corner of that fence, but almost to it; then we went across the country down to this creek here, down to this ravine here, or canyon rather, it was not a canyon either, crossing this fence in here somewhere (indicates).

Q. Which fence?

A. Well, it is indicated here as—

Q. Could you find it on Exhibit 1?

A. North's fence

Mr. LEWERS.—Have you any objection to my putting the words "North's fence" on here? [397]

Mr. PLATT.—No.

("North's fence" is marked by counsel on Exhibit "A.")

Mr. LEWERS.—(Q.) Then where did you go?

A. We followed the line of that fence, sometimes on one side and sometimes on the other, down this Toejam Creek.

Q. And where did you finally again take the auto,

(Testimony of J. Sheehan.)

does it show on Exhibit "A," compare it with Exhibit No. 1?

A. We took the auto about in here somewhere (indicates on Exhibit "A").

Q. Well, without reference to the map, can you describe the place that you took the auto, that is, from your recollection of the trip, on what creek was it?

A. On this Rock Creek; we had passed Toejam Creek; I believe it was down here on Rock Creek somewhere.

Q. Down on Rock Creek somewhere? A. Yes.

Q. And is that point indicated on Exhibit "A"?

A. I don't believe it is, I think it is below this place here.

Q. Now, starting out there, when you reached a point where the cottonwood clump of trees are, will you state what observations you made of the country?

A. It was rolling hills.

Q. Just what you did, before you describe the country. What efforts did you make to see what sort of a country it was?

A. Well, we would stop every here and there, and would look in both directions all around. Our attention was called to what was supposed to be barriers; we examined them and talked about them, as to whether or not we could ride over them, and all that kind of conversation.

Q. Now, starting down there by that clump of trees, state whether or not you looked at the country to the east or the northeast.

A. I did, both directions.

(Testimony of J. Sheehan.)

Q. And will you describe what you saw? [398]

A. Nothing but mountainous hills.

Q. Describe those hills.

A. Well, they were covered with sagebrush and snow, there were no barriers that I could see anywhere, except possibly away off at a distance of several miles, but anywhere that I could look and see around here, I saw no barrier or rim-rock that I thought I could not ride over with a horse.

Mr. PLATT.—Of course, if the Court please, we make a motion to strike out at this time, in order to complete the record, that any testimony of what is a barrier or what is not, is a conclusion of law, and an opinion of the witness, and, in our judgment, is improper. It is in line with the same objection we have interposed to questions before, and I move to strike out now, because the question propounded I think was proper, but the answer incorporates and includes more than the question, so I ask to strike out such portions of the answer as refer to the witness' opinion or conclusion as to what constitutes a barrier.

Mr. LEWERS.—I expect to inquire carefully as to just what he did see.

The COURT.—I will allow that to stand, subject to the objection. It will be the same ruling and same exception. As to this not being responsive to the question, that is another matter.

Mr. LEWERS.—(Q.) Will you state the character of the mountains or hills which you say you saw to the east and the northeast from that clump of cottonwoods, as to whether the surface or crests of those

(Testimony of J. Sheehan.)

hills were rough, rounded, smooth, or what they were?

A. They were rounded, some places rocks sticking over them.

Q. And for what distance could you see them, approximately? A. For possibly 3 or 4 miles.

Q. Now, did you see anything in there, and if you did, describe it, in the way of an obstruction to the passage of animals? [399]

Mr. PLATT.—I object, if the Court please, upon the ground that the question is leading; and upon the further ground that it calls for an opinion of the witness as to what is an obstruction. The witness is an intelligent person, and is able to describe what he saw without, in my judgment, drawing any conclusions.

The COURT.—I think I will allow that to stand. Of course the use of the word “obstruction” there calls attention to the description of what he wants. He can describe what he saw, and the Court will decide whether it is an obstruction or not.

Mr. LEWERS.—I will withdraw the question, and ask this—

Mr. PLATT.—Withdraw the objection.

Mr. LEWERS.—(Q.) In looking out in those directions you have mentioned, describe what you saw on those rolling hills you have described, in the way of anything that was there.

A. Well, they are hills typical of that section of Elko county; they were covered with snow and sagebrush, and raising in this direction.

Q. By “this direction” what direction do you mean by the compass?

(Testimony of J. Sheehan.)

A. To the northeast, I believe it would be.

Q. How much snow was there there?

A. I should say a foot or a foot and a half, some places it was deeper where it drifted.

Q. Were any of those hills bare?

A. Yes, in places, where the wind had blown them.

Q. How about the tops of those hills that you could see, as to snow?

A. They were all covered with snow, except where the rocks would stick through. That is, you have reference to hills that we passed over?

Q. No, to hills that you could see to the northeast?

A. Well, the tops of them looked as though the snow had been blown off. [400]

Q. Then were the tops covered with snow or not?

A. No, these all here looked to be bare; I will say those we had ridden over were covered with snow, but these up here looked as if the wind had blown the snow off, we could see that.

Q. Now, where was it you said you could see those hills that were bare?

A. Off in this direction (indicating).

Q. That is which direction? A. Northeast.

Q. I call your attention to Exhibit No. 1, pointing to a place marked Opening No. A, where you have testified the clump of trees was, and I call your attention to an irregular mark along there, denominated below here, barrier, will you state whether you looked in the direction of where that alleged natural barrier stands? A. I did.

Q. What did you see there?

(Testimony of J. Sheehan.)

A. Well, I didn't see that. I saw the same hills that are around through here.

Q. What kind of hills?

A. Rolling hills, sloping from this canyon in here, up, and looked as if they sloped again the other way after getting on top.

A. Now, from your experience as a cattleman, and your observation as such, was that a country that cattle could pass over?

Mr. PLATT.—Same objection as we have heretofore made, if the Court please.

Same ruling. Same exception.

Mr. LEWERS.—Referring to the point indicated on Exhibit No. 1 as a natural barrier.

A. May I be permitted to answer that?

Q. Yes. A. What is the question, please?

(The reporter reads the question.)

A. In my opinion it was a country that cattle could pass over.

Q. Now, after you reached that clump of cottonwoods, I understand you to testify that you went northward along what is known as Nelson's fence?

A. Yes, sir. [401]

Q. Now, did you make any observations of the country while you were passing along there?

A. We did.

Q. On which side? A. Both sides.

Q. What do you mean by both sides?

A. Both sides of us; well, practically all around us, we observed the country all around.

Q. Now, taking a point, say, a quarter of a mile

(Testimony of J. Sheehan.)

above the cottonwoods, did you anywhere in that vicinity make such an observation? A. We did.

Q. Now, what was the nature of the country that you observed toward the northeast on that occasion?

A. Well, just the same hills, and the same view almost, only a little higher up, just the same mountainous hills.

Q. What was the character of those hills as compared with what you have described down below?

A. Very similar to the hills that were below there.

Q. And what was the character of the hills to your left, or toward the southwest?

A. That would be off in this direction (indicating)?

Q. Yes. A. Just those rolling smooth hills.

Q. How did they compare with those to the east and northeast?

A. In character about the same, only lower.

Q. Now, as you went farther north along that Nelson fence, did you make any further observation of the same kind? A. We did.

Q. And what was the character of the hills that you observed to the east and northeast then?

A. I saw no change, they were the same thing.

Q. And carrying that again clear across to the point where you reached the Noble fence, what was the character of the hills that you observed to the east and to the northeast? [402]

A. Just the same all the way along.

Q. How far could you see, approximately, toward the east and northeast, at different points along that line? A. I should judge 3 or 4 miles.

(Testimony of J. Sheehan.)

Q. Now, I call your attention to Exhibit No. 1, and to a long, irregular snake-like thing, labelled Toejam Mountain, and I will ask you whether or not you saw that as indicated on the map?

A. Well, no, I didn't see any mountain by that name, never heard that name for a mountain; I have heard the creek named Toejam.

Q. Aside from the name, that is denominated on the exhibit as a natural barrier, did you see any mountain, rim-rock, natural barrier, or anything corresponding to that, if so, describe exactly what you did see?

Mr. PLATT.—If the Court please I think that is manifestly leading.

The COURT.—Strike out the first part of it, and simply describe any elevation you saw to the northeast.

Mr. LEWERS.—That is all I want. I will withdraw the question and adopt the Court's question.

A. The first elevation of any consequence whatever, from this around through here, would be what I believe is known as Independence Mountain, which would be several miles from this point up here; that looks as though it might have some very high rocks after you get up on that mountain.

Q. And about how far off was that, as near as you could judge? A. From where we were in here?

Q. Yes.

A. I should say it would be 5 or 6 miles.

Q. Now, I will ask you to describe the territory that you observed toward the east and northeast be-

(Testimony of J. Sheehan.)

tween you and those mountains; state what you saw on the territory, those mountains called Independence Mountains. [403]

A. Between Independence Mountain and where we were?

Q. Yes.

A. Well, they were small mountains; that is, they were considered by some as very large mountains; they were larger than these that are here, but they were rolling, sloping hills, very similar to around in here.

Q. By "around in here" indicate where.

A. Indicating along this cottonwood clump, that way, went up here, then there is a gradual elevation, they will get higher off in this direction.

Q. Now, describe anything that you saw in the way of rocks on those mountains.

A. Well, at intervals we find rocks sticking up, some of them look to be high, but not continuous.

Q. You say they were not continuous; describe the intervals between them, what was the character of that?

A. Well, between would be just—well, I had better describe them, they looked like what the prospectors would call blow-outs or clips of rocks standing up, some of them possibly would be the width of this room, looking off at a distance. You mean off in this direction?

Q. Yes. What I want to get at is, what was the character of the ground on those hills, between those blow-outs?

(Testimony of J. Sheehan.)

A. The same as on these hills here, sagebrush, rolling, sloping hills.

Q. Basing your answer on your experience and observation as a cattleman, was that a country through which cattle could pass? A. It was.

Same objection, ruling and exception.

Q. Is that such a country that cattle would graze over it? A. Yes.

Q. Is it such a country as cattle would graze over without being driven? A. Yes, sir. [404]

Q. Now, calling your attention more particularly to the country you actually rode over, was that such country as cattle could pass over?

A. Yes, sir, it was.

Q. Well, in saying they could pass over it, what do you mean?

A. I mean that cattle would pass over it at their own will at any time they wanted to.

Q. And how did it compare with country farther to the southwest?

A. About the same, a little rougher along here than it is down in here.

Q. Now, Mr. Sheehan, will you describe what you saw of that Noble's fence, tell all about it.

A. Well, we followed the line of that fence quite a distance, sometimes on one side and sometimes the other; we came to places where it was down, covered with snow, we would pass over it. It was an old fence built of barb wire that they don't use now, you don't see much of it. In places the posts were decayed and broken off, or blown over; the fence looks

(Testimony of J. Sheehan.)

as though it has not been kept up for a number of years.

Q. What was the condition of the wires, as to their appearance?

A. The wires were wires that were used in years gone past.

Q. What was their condition, as to preservation?

A. In some places it was bad, other places it was all right.

Q. I mean as to whether or not it was rusty.

A. Yes, it was rusty.

Q. And was the snow deep enough at any point on there to cover any of the posts that were standing?

A. No, sir.

Q. How much snow was there along through there?

A. About a foot or foot and a half, probably.

Q. Was that snow continuous? A. No, sir.

Q. What do you mean by that?

A. I mean that in places it was drifted and barren, the ground [405] was exposed, and as we went down westward, it gradually lessened until it disappeared.

Q. That is, the snow disappeared? A. Yes, sir.

Q. What would you say, from appearance, was the probable age of that fence?

A. I remember seeing that wire and handling it 20 years ago; it was wire that was painted at one time black, the barbs were different from the wires that are used now; it appeared to be some years.

Q. How about the posts on that fence, did you observe any of them? A. A few of them, yes, sir.

(Testimony of J. Sheehan.)

Q. And what was their condition?

A. They were old posts, broken off, rotted off, some places.

Q. Now, Mr. Sheehan don't answer until counsel has an opportunity to object. Calling your attention to Exhibit 1 and to that portion of it marked Toejam Mountain, and denominated in the legend as natural barrier, did you see any such thing there?

Mr. PLATT.—No objection.

A. I did not.

Mr. LEWERS.—(Q.) Was there any such thing there? A. Not that I could see.

Q. Did you see that territory where it is represented to be? A. I did.

Q. Did you examine it closely?

A. From our horses, we did not go over onto that ground.

Q. Could you see that territory distinctly?

A. I could.

Q. Did you observe any such thing as that in looking? A. I did not.

Q. Now, turning to Exhibit 1 again, and the lower so-called natural barrier, did you observe that particular territory? A. I did. [406]

Q. Did you see that barrier?

A. I did not see a barrier; I saw one bunch of rocks sticking up there.

Q. How big?

A. Oh, I could not say, it was on a little point, as I remember it, comes down into the slope from a little to the north of the spring, near the end of the Nelson fence.

(Testimony of J. Sheehan.)

Q. Near the end of the Nelson fence; and where was that with reference to this ravine you have told about?

A. Well, it is on the northerly slope of that ravine, running off in that direction.

Q. In your opinion as a cattleman, was that rock that you saw sufficient to turn cattle from going through that country?

A. No, it would not bother them going through the country; they could not go over that cliff of rocks, though, they would have to go around the rocks.

Q. From your observation of the ground, would they have any difficulty in going around it?

A. No, sir.

Q. How long was that cliff of rocks you have described?

A. Well, it didn't look very large; it reminded me just about like this building sitting in that street.

Q. What do you mean by that?

A. Just looked like a building sitting up there, or a cliff of rocks, probably 100 feet or 75 feet in length; I don't know how far it would be either way; it was just on a point of a hill, as I remember it.

Q. You mean in the nature of sort of a promontory sticking out? A. Yes, about like that.

Q. And was it a mile long? A. Oh, no.

Mr. PLATT.—I ask that that be stricken out, if the Court please. I don't see why I should be compelled to object to this kind of questions all the time Why not ask him how long it was.

Mr. LEWERS.—That is all. [407]

(Testimony of J. Sheehan.)

Cross-examination.

Mr. PLATT.—(Q.) Mr. Sheehan, if that thing as big as a house, or as big as a building, as this building, were set between two fence posts, would you call it a barrier?

A. If the fence posts were close enough together I would.

Q. It would be a barrier, would it?

A. Yes, sir.

Q. Well, suppose the fence posts were 10 feet on the other side of this big thing, would you then call it a barrier?

A. Ten feet on the other side of it?

Q. Yes.

A. Well, I didn't go right over onto that, I don't know about the other side; but if it was 10 feet on the other side—

Mr. PLATT.—You understand my question, don't you?

Mr. DENMAN.—Let him finish the answer. We object to the interruption.

Mr. PLATT.—I ask that the answer be stricken out on the ground it is not responsive to the question.

The COURT.—Ask another question.

Mr. PLATT.—(Q.) Suppose this thing I hold in my hand represents something as fixed, and 10 feet on this side is a post attached to a fence, and 10 feet on this side is another post attached to another fence, would you call that a barrier?

Mr. LEWERS.—If the Court please, I make the same objection counsel did; it is calling for the con-

(Testimony of J. Sheehan.)

clusion of the witness as to the meaning of a barrier; and the further objection that it is a hypothetical question, not based upon testimony in the case that there is a fence connected in any way with this jot of rocks that he has described.

The COURT.—The objection will be overruled. You may have an exception. [408]

A. It would be a barrier in a way, but if the post was 10 feet away from it it would not be.

Q. Your idea of a barrier is something that must absolutely obstruct, is that true?

A. Yes, sir. That is, something that will prevent the free coming and going of cattle or stock.

Q. That is your idea of a barrier? A. Yes, sir.

Q. Now, suppose this barrier 75 or 100 feet long, confronted a lot of cattle that were tending toward the center of it, and they were trying to get upon an inclosure on the other side, and their free and ready access would be impeded because they would have to go around that barrier, and to go through an opening 10 feet on the other side of it, would you call that a barrier then? A. No, sir.

Q. You would not?

A. No, sir. If cattle and sheep had only to go 100 feet to get around that barrier, I would not call that a barrier.

Q. You would not call it a barrier? A. No, sir.

Q. And that is your idea of a barrier?

A. Yes. You find those kind of barriers in all these hills; you find those kind of barriers in all our mountains.

(Testimony of J. Sheehan.)

Q. Suppose there were a hill 500 feet long, over which cattle had to climb, making a considerable effort to get over, in order to get into an inclosure, but suppose if they went to either side of the hill they could go through a gate 50 feet wide, would you say that that was a barrier, impeding the ready access of those cattle to the inclosure?

A. No, sir, I would not.

Q. You would not call that a barrier?

A. No, sir.

Q. Suppose that hill or mountain were 2,000 feet long, and at the end of it there were 50 feet along on each side?

A. That would be a barrier.

Q. You would consider that a barrier?

A. Yes, sir. [409]

Q. Then it depends on the dimensions of the hill or mountain, before you would say whether it is a barrier or not?

A. Well, yes, certainly.

Q. Who suggested that you take this trip, Mr. Sheehan?

A. Mr. Lamb.

Q. Mr. Lewers accompanied you, did he?

A. Yes, sir.

Q. What did you go for?

A. Went for the purpose of looking that ground over.

Q. For any other purpose?

A. No, sir.

Q. Did you know at that time you were going to testify in the case?

A. Not particularly, no, I went for that purpose, and also for recreation, for the chance to get back in that country.

(Testimony of J. Sheehan.)

Q. Did anybody suggest what you were to look for?

A. Not until we got up there with the horses, and then we talked it over.

Q. Then you didn't have any conversation as to the purpose of your trip, or what you went to look for, until you left the automobile and took to the horses?

A. Yes, I believe we did before that, but we didn't—

Q. Well, was there anything said in the automobile upon the trip to the effect you would not find any barriers or inclosures up there, and they wanted you to go up there and look for those kind of things?

A. There may have been.

Q. In other words, the entire sentiment expressed in the automobile was, when you got up there you won't find those things the Government is claiming, is not that true?

A. That seems to be true, not only in the automobile, but in the community I have heard it.

Q. In the whole community? A. Yes.

Q. You went up with the idea of corroborating the ideas of the people in the automobile, and corroborating the sentiments of the [410] people in the community?

A. Partly for that and partly for my own recreation.

Q. Those were the two reasons? A. Yes.

Q. As a matter of fact, you didn't go up there in a fair frame of mind? A. I did.

Q. Didn't you go up there to corroborate those

(Testimony of J. Sheehan.)

sentiments expressed to you?

A. No, I went up there, and if I saw they were there, I would say so.

Q. Upon which side were you leaning when you went up there? A. None at all.

Q. None at all? A. No, sir.

Q. Did you have the same sentiment as the other people in that community?

A. I did after I made the trip.

Q. Had you before?

A. No, sir, I knew nothing about it then.

Q. You had expressed no opinion, and had no sentiment as to the other people in that community?

A. I think not, they were nearly all strangers to me.

Q. How do you know that sentiment existed in that community?

A. Because talking to other men afterwards about the thing, and while going on our trip.

Q. You talked afterwards about it, and upon the trip about it? A. Yes, sir.

Q. Did anybody say on the trip, that is no barrier, and that is no inclosure?

A. I think we all said that.

Q. And that was the general expression of opinion, wasn't it, as made, going around the fence?

A. Yes, sir.

Q. Now as a matter of fact, you don't know what the legal definition of a barrier is, do you?

A. No, I don't know what the legal definition would be.

(Testimony of J. Sheehan.)

Q. And as a matter of fact, you don't know what the legal definition [411] of an unlawful inclosure is, do you?

Mr. DENMAN.—Object to that question on the ground there has been no question as to the inclosure.

The COURT.—He has not testified about an inclosure, he has used the word barrier.

Mr. PLATT.—I withdraw the question.

Q. You say you don't know what the legal definition of a barrier is?

A. I don't know what the law would call it, no, sir.

Q. And you don't know what the legal definition of a gap is, do you?

A. Well, I certainly know what a gap is, but I don't know what the legal definition is.

Q. But you don't know what the legal definition is?

A. No, I do not.

Q. How much higher, Mr. Sheehan, was the territory or country represented as in the northeast section of that plat than the country further down, say in the southwest corner?

Mr. LEWERS.—Do you mean down at the Ranch House?

Mr. PLATT.—Yes; I mean down in the southwest corner, whatever that is.

Mr. DENMAN.—Southwest corner of what, Mr. Platt?

Mr. PLATT.—Of the plat.

A. Oh, it is considerably higher.

Q. Do you know about how much higher?

A. No, I do not.

(Testimony of J. Sheehan.)

Q. Well, it was up in the snow line, wasn't it?

A. Yes.

Q. Did you find any snow down at the southwest corner? A. No, sir, we did not.

Q. Was it dry down there?

A. There was snow, a little, around the sagebrush, but nothing to speak of.

Q. Not very much? A. No, sir.

Q. There was much more snow, wasn't there, away up in the northeast corner where you were than there was down in the southwest [412] corner?

A. Yes, sir.

Q. Was the country up there very well covered with snow?

A. On the same elevation across Rock Creek there was no snow at all, but on the other side where we were, there was a foot or foot and a half of snow.

Q. Did that completely cover the country?

A. Yes, sir, except where the wind had blown it off.

Q. Except where?

A. Except where the wind had blown it off.

Q. Had you ever been up there before, Mr. Sheehan? A. Not on this side.

Q. Had you ever been up into that section shown on the plat as the northeast section of it?

A. No, sir, I never had.

Q. You know that is good grazing land up there, if it was pretty well covered with snow?

A. Well, judging from the general character of the country, and from the hills that were exposed.

(Testimony of J. Sheehan.)

Q. That is how you reach that conclusion?

A. Yes, sir, and from my knowledge of that country up in there.

Q. Where do you get your knowledge?

A. I used to ride around that country in early days, that is, not on this side, from the other side, around towards the Tuscarora side.

Q. That is, the knowledge of that country which you have, was derived from your actual knowledge of country away from there, is not that it?

A. Yes, you might put it that way, that is about it.

Q. Now, in response to one of the early questions asked by counsel in your direct examination, in which he asked you concerning the topography of that country represented in the northeast corner of the plat, I have a memorandum here that you answered, "Nothing but hills and mountains"; now what did you mean by that. "I saw nothing but mountains and hills," and after that you qualified [413] it by saying for 3 or 4 miles; what did you mean by that?

A. That was about as far as we could see from there; we then could see a higher mountain off, which I have described, which I understand to be Independence Mountain.

Q. Then I understand from your testimony, as you stood down here, say along the line represented by North's fence, and looked in a northeasterly direction, you saw nothing but hills and mountains?

A. That is all, with ravines of course.

Q. With ravines. Now it was a mountainous

(Testimony of J. Sheehan.)

country, was it not? A. Yes.

Q. There is no question about that, is there?

A. No.

Q. It was certainly a mountainous country?

A. It was certainly a mountainous country.

Q. As a matter of fact, you would call this north-eastern section a mountainous country, wouldn't you?

A. I would call it all mountainous country.

Q. You would call all this section in there mountainous country? A. Yes, all mountainous.

Q. Now, counsel asked you, Mr. Sheehan, as to whether this thing here shown upon the plat as Toe-jam Mountain, as to whether you actually saw that thing; now as a matter of fact, do you know what that thing represents?

A. No; I didn't see anything there like it.

Q. You didn't see any creature like that, did you, represented upon the plat?

A. No, and I didn't see any mountain like that.

Q. You didn't see any mountain just as it is depicted on the plat? A. No.

Q. When you looked up in that northeastern section of land you say you saw a mountainous country, don't you? A. Yes.

Q. And it was mountainous, was it not, compared with this country [414] down here over which I am pointing my pencil?

A. Yes, there is a difference.

Q. Now is not there quite a pronounced difference?

A. Yes.

(Testimony of J. Sheehan.)

Q. Between the northeast section of that plat and the part indicated as Government land, within these creeks?

A. Yes, sir; those down in there are rounding, lower hills, while up here they would break more abruptly.

Q. In other words, this seems to be a rounding, rolling country, and I suppose flat in places?

A. Well, might have been, we didn't go down in there.

Q. You didn't go down in there? A. No, sir.

Q. But as distinguished from that, this northeast section was a hilly, mountainous country?

A. Yes, sir.

Q. Now, Mr. Sheehan, in your experience as a farmer or rancher or stockraiser, did you ever know of a new piece of barb wire being placed out all winter, and subjected to rains and storms and winds, and the next summer evidencing rust?

A. Place it out over winter, and find it rusted next spring?

Q. Yes. A. No, not generally.

Q. Well, did you ever see it?

A. No, sir; I don't know as I have.

Q. You don't know as you have?

A. Not for one season.

Q. Suppose you placed it out three or four seasons in the same way, does it ever get rusty?

A. Sometimes, yes, sir.

Q. In your judgment, is a barb wire fence up 6 or 7 years an old fence?

(Testimony of J. Sheehan.)

A. No, not if it is put up with proper posts, and so forth, it is not an old fence in 6 or 7 years.

Q. And after having been exposed to the weather and the climate for that length of time, it would not be extraordinary, would it, if it were rusted?

A. Well, yes, in 6 or 7 years barb wire [415] hadn't ought to rust in that time.

Q. Did you ever see any rusty at the end of that time?

A. Well, I don't know. We have some barb wire around different ranches, some of it is rusty, and some is not; I don't know how long it had been there.

Q. As a matter of fact, can you tell the age of a fence by the rust on it?

A. No, I don't think you can, only by the general appearance of the fence, it gives you an idea.

Q. Now, you didn't go up there, and never have been along that fence line until this automobile trip about which you testified? A. That was all.

Q. And, of course, so far as the condition of the North fence was concerned, you don't know whether it was pulled down or fell down or when it was pulled down or when it fell down, do you?

A. I don't know, only from my own knowledge as to the looks of the fence, and where it had fallen over.

Q. Well, you don't know whether it fell over two or three days before you got up there, do you?

A. It could not have fallen over that soon; some places indicated it had been down for some time; you could tell from the posts where they had rotted off, and from the way the wire had lain into the snow and

(Testimony of J. Sheehan.)

mud, it had been down for some time.

Q. But you don't know whether it fell down or was pulled down, do you? A. No, I don't.

Q. Did you examine all of the gaps and gates and openings in the fence as you went around it that day?

A. I didn't all of them, no, sir; only those through which I passed.

Q. And, of course, those through which you passed you didn't know, and don't know now of your own knowledge, when they were put in the fence, do you?

A. No, sir; I do not. [416]

Mr. PLATT.—I think that is all.

Redirect Examination.

Mr. LEWERS.—(Q.) Mr. Sheehan, what kind of wire is ordinarily used within the last few years for building fences?

A. Generally the galvanized iron, without paint.

Q. And was this galvanized wire?

A. No, sir; I don't think it was, it was coated with a black paint in its early—when it was first put on.

Q. Will you describe the kind of barbs it had on with reference to the kind that is used nowadays?

A. The kind that is used nowadays seems to be made out of a wire; and that seemed to have been made out of more of a metal, that is, the barbs were heavier, and different shape than what we use now.

Q. Well, would you denominate that old-fashioned wire or modern wire?

A. I would say it was old-fashioned wire.

Q. Now, what was the appearance of that Noble fence as to whether it had been torn down, or fallen

(Testimony of J. Sheehan.)

down by decay?

A. The impression I got was that it had fallen down, where we had passed over it.

Q. Now, you have been asked several times with reference to your observation of the hills and mountains to the east and northeast from where you crossed that gap, and those to the southwest; now, what was the difference in those mountains as to their character, other than the difference in elevation?

A. Well, they were all rolling hills, until they passed up to the east of where we went across with the horses, then they were larger, more mountainous, a little more abrupt, and not quite so rolling as they were to our left.

Q. How far from where you were did that character change? [417]

A. I should say—off to the northeast?

Q. Yes. A. From 2 to 4 miles.

Mr. LEWERS.—That is all.

The COURT.—(Q.) Mr. Sheehan, did you cross any ridges? A. Yes, sir.

Q. Where was that?

A. We started down, before we came to the Nelson fence, we went over a ridge.

Q. Where was that; could you point it out to me?

A. Yes, sir. After coming up this Siawappe Creek, about here where there is a jog in the fence, we came up a ridge here, and then after passing the telephone line to this spring (indicating on plat); then we started to climb a ridge, we went up this ridge until we got up in here, and we seemed to reach what

(Testimony of J. Sheehan.)

we usually call the summit of this ridge.

Q. This ridge, which direction does that run?

A. It seems to run down this way, northeast and southwest. We climbed up this ridge, then along here, and then we crossed down and went back down into this little valley or canyon down here.

Q. Were there any ridges running there, except northeast and southwest?

Yes, sir, I think there was. One place we went up here was quite steep; it was running in the opposite direction from what this one was here.

Mr. DENMAN.—(Q.) What section is that where you say it was quite steep, Mr. Sheehan?

A. It is not indicated here.

Mr. LEWERS.—Will you indicate the point, and then we will try to locate the section.

A. It was just after we scared up that big flock of mallard ducks, and I was watching the ducks more particularly, but I think it was along in here somewhere (indicates).

Mr. LEWERS.—That would be in section 20, on Siawappe Creek? A. Somewhere in there.

[418]

The COURT.—(Q.) Were there any watercourses you crossed going toward the south from Willow Creek, or toward the east? A. Going back?

Q. No, toward Willow Creek or Siawappe Creek?

A. Yes, sir, there were creeks came in from different ways, small creeks running down in the ravines.

The COURT.—That is all.

Mr. DENMAN.—If the Court please, I desire to be sworn. [419]

[**Testimony of William Denman.**]

WILLIAM DENMAN, after being sworn, testified as follows:

Mr. LEWERS.—(Q.) Your name is William Denman? A. Yes, sir.

Q. And you are an attorney at law?

A. Yes, sir.

Q. And one of the counsel for the defense in this case, are you not? A. Yes, sir.

Q. Were you employed in connection with the matters involved in this suit, or any of them at any time during the year 1911? A. Yes.

Q. Were you in the month of June, 1911?

A. Yes.

Q. Are you acquainted with Mr. Platt, the United States Attorney? A. I am.

Q. Did you at any time in June, 1911, have any conversation with him with reference to any matters involved in this suit? A. I did.

Q. Calling your attention more specifically to the territory involved, where the so-called natural barrier is, did you have any conversation with reference to that? A. No.

Q. Did you have any conversation with reference to the entire alleged inclosure? A. Yes.

Q. Will you state what the conversation was?

Mr. PLATT.—I would like to know what the purpose of this examination is.

Mr. DENMAN.—Offered to take Mr. Platt out there, and go over the ground. Shall I go on? Is that an objection?

(Testimony of William Denman.)

Mr. PLATT.—Well, I don't interpose any objection. I don't see any materiality, if the Court please, to any such testimony.

Mr. LEWERS.—Will you proceed and state what, if any, offer was made?

A. I cannot give the exact words of the conversation. I had [420] received notice of the filing of the suit, of the two suits, one involving the Little Rock Creek inclosure, and one involving this, and I shortly came up to see Mr. Platt, because we had an understanding there was going to be a civil settlement of the disputed questions at Little Rock Creek, and I said to him at that time, "Now, Mr. Platt,"—substantially this—"if you and I could go together over those fences at both places"—

The COURT.—Excuse me a moment. Do you claim the Government is bound by this?

Mr. DENMAN.—No, I simply want to show that this trip we took up here is one the Government would have been invited to go on if they had not declared they would not go with us over the ground.

Mr. PLATT.—I submit I am quite willing to take the witness-stand and testify to the best of my recollection what I stated; but I do contend this, if the Court please, that there have been many offers made by the defendant company, and there have been many suggestions made by the Government through its representatives here in Carson, and through its representatives in Washington; and there have been many things occurring, if the Court please, whereby the offers and representations as made by the defend-

(Testimony of William Denman.)

ant were not complied with, and there have been many things occurring, if the Court please, whereby the suggestions made by the Government have not been adopted; and this question of my offering to go over and view the land, and look at the land, might have been a suggestion or offer coming from Mr. Denman or myself. I should have been very glad to have viewed the premises had it been practicable, but I could not do it, I didn't have the opportunity to do it; and I had to rely, and do rely, on the reports of the agents, which the testimony will show, if I [421] am permitted to testify, whether I do so or not makes no difference, but if I am permitted to testify, I will show that not on one occasion, but on two occasions, I ordered the Government's representatives to make a second report on the Squaw Valley inclosure, with a view of reporting to me subsequently.

Mr. LEWERS.—If the Court please, I desire to strike out all of the remarks of Mr. Platt in so far as they contain a statement of what was done, first, on the ground they are not in reply to any question; second, on the ground they are not made by him as a witness, although they are testimonial in their nature; third, on the ground that in so far as they contain statements that suggestions have been made, and that the defendant has not complied with those suggestions, that they are prejudicial to the defendant, and that they bring in a large number of matters which are not involved in the record in this case, and which we cannot meet, consisting merely of as-

(Testimony of William Denman.)

sertions that tend to indicate that we have not acted in good faith.

The COURT.—Now, gentlemen, Mr. Lewers has stated the whole thing. If I take this testimony under consideration, how can I refuse to allow Mr. Platt to go on and state propositions that have been made by the Government, and the way they have been treated?

Mr. DENMAN.—May I answer that question?

The COURT.—Just a moment. And where will the end of it be? And even if I allow it, what effect will it have? If I find it is an illegal inclosure, I must so decide; if I find it is not an unlawful inclosure, I must so decide, irrespective of offers that have been made, or offers that have been rejected.

[422]

Mr. DENMAN.—The only purpose of this testimony is to show in response to a certain line of questions by Mr. Platt to Mr. Sheehan, from which the inference might be drawn, that this was a one-sided trip, on which the other side was not represented: That in the month of June I called on Mr. Platt and offered to go over the premises with him, and he stated on account of the pressure of business, and other things, he could not go; that it was never his practice to go out on cases of this kind, he could not do it, on account of the press of business he had on hand. I made the offer to go over the premises with him, and it is not a one-sided trip.

Mr. LEWERS.—I ask for a ruling to strike the other testimony or statements of Mr. Platt from the

(Testimony of William Denman.)

record. It was not in the nature of an objection.

The COURT.—It may go out. But if this testimony goes in and Mr. Platt wants to go on the stand and testify, I shall permit him to do so.

Mr. LEWERS.—I have withdrawn the question.

Mr. PLATT.—Very few questions have been asked; and I have no objection, because, as I say, I don't consider it relevant at all, that the Court strike out everything from the record from the time that Mr. Sheehan left the witness-stand. I don't think any of it is proper in this record.

Mr. LEWERS.—I would not like to have it all stricken out of the record in that sense, because I moved to strike out, and also excepted to the nature of the statements made by Mr. Platt as prejudicial to the defendant, and that it involved the statement that we had not complied with promises. [423-5]

The COURT.—It will certainly not prejudice this Court, if you want it out. For some subsequent Court, that is another matter. I am perfectly willing to tell you that the extreme statement you make and the extreme statement Mr. Platt makes as to this matter will have no bearing with the Court now.

Mr. PLATT.—I ask that it all be stricken out from the time Mr. Sheehan left the witness-stand, because I don't think it is properly in the record.

The COURT.—Unless there is objection, I will allow it to be done.

Mr. DENMAN.—Well, we will object to the motion, your Honor.

Mr. PLATT.—Then as I understand counsel, you

(Testimony of William Denman.)

oppose the motion, and it all stays in the record?

Mr. DENMAN.—No, it is your motion to strike it all out we are opposed to.

The COURT.—What testimony have you in now?

Mr. LEWERS.—I don't know, except that the record shows we asked certain questions.

The COURT.—There was a statement made by Mr. Denman, which he made in response to my question, and I assume that he was talking then as a lawyer and not as a witness.

Mr. LEWERS.—That was my understanding.

The COURT.—So I don't think there is any testimony in at this time.

Mr. DENMAN.—The testimony that I made the offer to Mr. Platt.

Mr. PLATT.—Well, if that testimony is going to stay in, and your Honor thinks it is proper, I want to cross-examine the witness.

The COURT.—I think, gentlemen, I will strike the whole matter out, and you may have your exception. I would have been very glad to have stricken the whole thing out, objections, exceptions, [426] and the whole matter; but as it is, it is stricken out, and each of you has an exception to that portion of it.

[Testimony of Frank J. Button, for the Defendant.]

FRANK J. BUTTON, a witness called by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is Frank J. Button, is it not?

A. Yes, sir.

(Testimony of Frank J. Button.)

Q. And you live in Humboldt County, Nevada?

A. Yes.

Q. How long have you lived in the State of Nevada, Mr. Button? A. Since 1873.

Q. And in what portions of the State have you lived? A. In Elko and Humboldt County.

Q. And what is your position at the present time, Mr. Button?

A. General manager for Bliss Brothers.

Q. In what line of business? A. Cattle business.

Q. And where are the properties of the Bliss Brothers in the State of Nevada situated?

A. In Humboldt and Elko County.

Q. And where are they situated, if you know, with reference to the Squaw Valley Ranch of the Golconda Cattle Company?

A. Squaw Valley would be east of our summer range.

Q. And have you ever been in any of the territory covered by the Squaw Valley Ranch? A. Yes, sir.

Q. When were you there?

A. Well, the first time I went there was in 1874; but there was no Squaw Valley Ranch there at that time.

Q. State generally your familiarity with that country since that time? [427]

A. Well, I rode in there, attended rodeos, till 1883, 1882 I think was the last rodeo I attended in that country.

Q. When was the last time that you were in there, about how long ago?

(Testimony of Frank J. Button.)

A. It is a couple of weeks ago, I think, I don't remember the date.

Q. Did you accompany the automobile party that went up there? A. I did.

Q. And were you there at the time Mr. Sheehan was? A. Yes, sir.

Q. Now, I call your attention first to the Government's Exhibit No. 1, representing a portion of the Squaw Valley Ranch; this on the south side representing Willow Creek, that the Willow Creek reservoir, and this red line running along here representing a fence line to a point marked Opening No. 6; then running northerly up to a point, or a black line marked Nelson's fence, and then another fence marked in red, running north, also marked Nelson's fence, then across a point marked Opening No. 5, North's fence to Nelson's fence $1\frac{1}{4}$ miles, then over along what is marked North's fence, then down a creek marked Rock Creek, down to the point where we began. Now, do you understand that plat generally, Mr. Button? A. I do.

Q. I also call your attention to Exhibit "A," another plat, representing a portion of the same territory, beginning down here at what corresponds approximately to the Opening No. 6 there, running north along Siawappe Creek, Nelson's fence, across Opening No. 5 the same way, over to a creek marked on this plat "Toejam Creek," then on down to the junction of another creek, which is not marked. Now, do you understand that plat as compared with this one here,—the lower plat purporting to represent

(Testimony of Frank J. Button.)

only the northeast portion of the upper one?

A. Yes, I think I do. [428]

Q. Now, Mr. Button, on the occasion when you went up there with an automobile party, how far with reference to the reservoir, Willow Creek reservoir, approximately did you go in the automobile?

A. How far?

Q. Before you got off the automobile and took the horses?

A. Well, we just went a ways, about, maybe a quarter of a mile or half a mile above the reservoir.

Q. What sort of a place; will you describe the place where you got off to take the horses?

A. Why, sagebrush there, kind of a flat place where we got off to take the horses; it was at the end of the fence, I think, or where it corners.

Q. Were there any creeks there?

A. Yes; there was a creek I think they called Warm Creek, ran down, a small creek; the Willow Creek is a little further over.

Q. And from there generally, where did you go?

A. Well, we went up Willow Creek a ways, up one side, and crossed over on another side, and went up there to some cottonwoods, I think was the first place we stopped.

Q. And with reference to what I have indicated on the map, Mr. Button, pointed out on the map as Nelson's fence, that being Siawappe Creek running up there, where, approximately, will you indicate were those cottonwoods?

(Testimony of Frank J. Button.)

A. Where is the opening? It was close to the opening.

Q. An opening between what, what fences?

A. Two fences, I think one was Nelson's and the other one was the company's fence.

Q. You mean the Golconda Cattle Company?

A. The Golconda Cattle Company.

Q. I call your attention to a point near Nelson's fence, marked [429] Opening No. A, is that the place that you refer to?

A. Right to where Nelson's fence commences?

Q. Yes. A. Yes, sir.

Q. Now, what did you do when you came to the place where these cottonwood trees are?

A. Well, we got off the horses, and stayed there a while, looked across at the opening and the hills the other side.

Q. By hills the other side where do you mean?

A. Well, it would be east from where we was, I should judge, in that direction, a little north of east.

Q. Now, what did you see there?

A. I see some rolling mountains.

Q. Describe them more fully.

A. Well, there is small rolling mountains that runs through the country there, they are not very high, kind of small mountains.

Q. Now, what was there at this opening, what was the character of the ground there?

The COURT.—Is that Opening No. 5?

Mr. LEWERS.—Opening No. A.

A. Well, it is the same as all the ground mostly

(Testimony of Frank J. Button.)

in the State of Nevada, sagebrush and rocks, some rocks, and sand.

Q. What sort of an opening was it with reference to the ability of cattle to pass through it?

A. Well, I should judge the opening was about 300 feet wide, and sloped off down to a creek, and from there over onto smaller mountains.

Q. Did you observe the ground through that opening, and down toward the creek? A. Yes.

Q. Have you had any experience yourself, personally, in handling cattle? [430]

A. All my life you might say, ever since I was large enough.

Q. And basing your answer on your experience as a cattleman, could cattle get down through that opening, and down into that creek? A. Very easily.

Mr. PLATT.—Of course the same objection, if the Court please, that I have interposed to all of this line of questions.

The COURT.—Yes. The same ruling and same exception.

Q. And what was there in that clump of cottonwoods?

A. Well, there had been some posts cut there some time or other, a good many of them had been cut off I noticed.

Q. Was there any water there?

A. I believe there was a little spring of water there, I am pretty sure there was.

Q. State whether or not that clump of cottonwoods lies to the east or the west of the fence, general fence

(Testimony of Frank J. Button.)

line. A. It would lie to the west.

Q. And the stream you refer to lies, with reference to the fence, at that clump of cottonwoods, to the west or east, which? A. To the east.

Q. And how far, approximately, as near as you can recollect, was that stream from the clump of cottonwoods?

A. Well, I should judge about a half a mile, maybe not quite so far.

Q. And after you were at the point where the cottonwoods were, where did you go, generally?

A. Well, we followed up the end of that fence, I don't know whose fence it is.

Q. What sort of a fence was it?

A. Well, it was a fence of three barb wires, and made out of cottonwood posts.

Q. Referring to the plat again, Mr. Button, is that the fence [431] which is marked in red here on this plat as running north and slightly east from Opening No. A, this being Opening A here?

A. Yes.

Q. And as you went up that fence, did you take any notice of the surrounding country? A. Yes.

Q. In which directions?

A. Well, all directions, looking first one way and then the other.

Q. What were you looking for?

A. Well, I was looking for country, I wasn't looking for rabbits.

Q. And what was your observation of the country lying to the east and northeast, will you describe it,

(Testimony of Frank J. Button.)

that you observed as you went up along that fence?

A. Well, they are low rolling hills for a long ways, and after you look over there for quite a piece, of course I don't know, it would just be guesswork, for about 4 miles, there seemed to be a large mountain in there, a larger mountain.

Q. Did you at any time strike what is known as the North or Noble fence on that trip?

A. Yes, sir.

Q. And in crossing over to that fence, did you on the way over observe the country around you?

A. Yes.

Q. On which side? A. All sides.

Q. And what did you observe as to the character of the country lying to the east and northeast, and the north, as you crossed over there?

A. Well, there is low rolling hills there, about the same, the country there is all pretty near alike.

Q. What was the country to the southwest?

A. Well, there is a mountain or hill that runs down through there for a long ways, rolling hills, quite a number.

Q. In which direction is the general slope of the country there?

A. Which places would the water run?

A. No, taking those rolling hills that you looked at on your [432] right as you went up, and on your left?

A. There is one runs pretty near north and south. Do you mean to the left?

Q. Yes. When you were crossing over from the

(Testimony of Frank J. Button.)

Nelson fence to the Noble fence, and taking the country generally to the north and east, and the country generally to the east and west.

A. I should judge they would generally run east and west.

Q. What would be the general slope of the ridge?

A. Well, the general slope would be east and west.

Q. In which direction from you at that time did you see the highest mountains, is what I want to get?

A. It would be northeast.

Q. Calling your attention to this fence marked Nelson's fence, which you say was built of cottonwood posts, how far up did you follow that fence with reference to that corner?

A. Followed it up to the corner, I think; yes, I know we went up to the corner.

Q. That would be the point marked with an arrow, on the east arrow? Being the point marked as the east end of the arrow, joining the 1¼ mile opening?

A. Yes.

Q. Now, from that point, or the nearest point you came to the Nelson fence, what did you observe as to the character of the country lying east and northeast? A. Well, there was rolling hills.

Q. What would you say as to that country concerning the passage of cattle over it?

A. Cattle can go over it, I drove cattle over it.

Q. When?

A. Well, sometime in the 80's, 70's, along in 1882, I think. I rode most all over that country, and drove cattle most everywhere. [433]

(Testimony of Frank J. Button.)

Q. State whether or not you saw anything there, which from your knowledge of cattle and cattle business, would obstruct the passage of cattle.

Mr. PLATT.—Same objection, I assume that it goes to all this testimony?

The COURT.—Same ruling and same exception.

A. Not anything.

Mr. LEWERS.—(Q.) Referring to Exhibit No. 1, and going to the same point, near the end of the Nelson fence, I call your attention to an object to the north and east of that, appearing from the plat to be approximately a mile away, marked “Toejam Mountain,” and called on the plat a natural barrier. Now, what did you see there, if anything?

A. Why, I see a mountain, or hills, it wasn't very steep, rolling; nothing to prevent cattle from going up that mountain.

Mr. PLATT.—I ask that the last part of the answer be stricken out as not responsive to the question, although I suppose another question will be asked.

The COURT.—I will let that stand.

Mr. PLATT.—If your Honor will give me the benefit of the same exception.

The COURT.—Certainly.

Mr. LEWERS.—(Q.) Did you see anything in the way of rim rock or anything else, shaped like that, or running in that country anywhere like that?

Mr. PLATT.—I object on the ground the question is leading.

(Testimony of Frank J. Button.)

Mr. LEWERS.—Like this Toejam Mountain on Exhibit No. 1?

The COURT.—Read the question.

(The reporter reads the question.)

Mr. LEWERS.—I have already asked what he did see there; now I want to bring out about this specific thing. [434]

The COURT.—I think you can strike out of it about rim-rock, and so on. You are asking him whether there is anything there in the country, that is, similar to what is pointed out to him on the map.

Mr. LEWERS.—I will withdraw the question and reframe it. Q. Mr. Button, is there anything in that country, in the location or vicinity of what is marked on Exhibit No. 1 as Toejam Mountain, like that?

A. I would like to have it explained what you call that?

The COURT.—(Q.) Let me ask you, Mr. Button, is there any ridge running across there from the northwest to the southeast on that?

A. Yes, there is a ridge runs along there; there is mountains all along there, low mountains, some of them is higher than others but from here out, this mountain comes down here, there is a mountain along that.

Q. Does it run along there in the direction of that line on the map, just run your pointer?

A. Well, there is one runs along there something similar to that, but I don't think there is one runs so far as that, that I noticed.

Mr. LEWERS.—(Q.) Describe what it is, de-

(Testimony of Frank J. Button.)

scribe its appearance, its surface.

A. Well, it is quite rocky, and sagebrush on the ground.

Q. How about it for the passage of cattle?

A. All right.

Q. What do you mean by all right?

A. The cattle could go over it easy enough.

Q. Do you know whether they do?

A. No, I could not answer that question, to be sure.

Q. How did it compare with the rest of the country that you have described toward the northeast?

A. I could not see much difference in it. That mountain there was a little bit higher, I should judge, than some that was further back; the further up [435] you go, the higher the mountains get.

Q. Now, I call your attention again, Mr. Button, to Exhibit "A," and to an object or delineation in section 34 of that, lying to the northeast of the point near Nelson's corner that you have referred to, marked there a hill; I will ask you if that represents in any way what you saw?

A. Yes, there is a hill across the creek from there.

Q. When you crossed over from the last point you have described, over to Noble's fence, did you make any examination of that fence?

A. You mean Mr. Noble's fence?

Q. Yes.

A. Well, I think I rode in and out of the fence three or four times, crossed it backwards and forwards going through there, three times, I believe.

Q. Well, will you describe the fence just as fully

(Testimony of Frank J. Button.)

as you can, what you found and observed in connection with it?

A. Well, in the first place, I think we came to, I should judge it was down about 300 feet, it was laid over on the ground, and quite a number,—I noticed the fence had rotted off there, redwood posts through there, and the fence was made out of the old-fashioned black wire we used to use. Then there was, oh, a number of places all along from there down to Toejam, that the fence was down in different places, laid over; laid over on the ground, in some places the posts was rotted off.

Q. From your observation of that fence, or from knowledge that you have, how old would you say it is?

A. Well, it is an old fence; I should judge it was 20 years old, if not older.

Q. What was the appearance of that fence as to whether it had been torn down, or as to whether it had fallen down through decay?

A. Well, the fence, I should say it had fallen down through the posts rotting off. [436]

Q. Now, in crossing over through that territory, from the Nelson fence over to the Noble fence, I will ask you whether or not the ground that you crossed over was of a character that cattle could pass over it?

A. Yes, sir.

Q. Now, do you know, Mr. Button, what the character of the feed in that vicinity is during the summer?

A. Well, what the feed is now and what it used to

(Testimony of Frank J. Button.)

be, I know what it used to be in early days, but since 1883, since I drove in there—

Q. What was it then?

A. In the spring there was some feed there, but it generally dries up early, it does all through this country, in them low foothills.

Q. But I am referring to up around the vicinity of this Nelson fence, and to the north and east thereof.

A. North and east of the Nelson fence?

Q. Yes, higher up.

A. Higher up there is good feed in there, or used to be.

Q. Now, referring to the land lying to the southwest of the point you have last described, indicated on Exhibit No. 1 as the white land, inside of the blue, are you familiar with any of that country in there?

A. Yes, sir.

Q. Have you ever ridden over any of it?

A. Yes, sir.

Q. Now, what is the character of that land down in there as to the feed on it?

A. Well, we never considered it much account only in the spring there is some feed grows there in the spring, it generally dries up early. The higher up you get the better the feed is always, in the mountains.

Q. Now, Mr. Button, what is the natural tendency of cattle in the northern country as to their drift during the summer; that is, where do they drift in fact, is what I want to get at.

Mr. PLATT.—Same objection; and on the further

(Testimony of Frank J. Button.)

ground he has [437] not shown that he knows what the natural tendency is. When I say the same objection, I mean that it is calling for the opinion or conclusion of the witness.

The COURT.—It will be the same ruling and exception.

Mr. PLATT.—And the further objection that he has not shown that he knows the tendency of cattle in that vicinity.

Mr. LEWERS.—Answer the question.

A. I don't know as I exactly understand the question now.

Mr. LEWERS.—I will withdraw it for the time being, and ask another.

Mr. PLATT.—I withdraw the objection.

Mr. LEWERS.—(Q.) Do you know, Mr. Button, the natural trend of cattle during the summer in that northern country?

A. Well, yes, I know what they used to be.

Q. What was it?

A. They used to go up, the cattle used to go up on these low foothills early in the spring, and then work up into the higher hills.

Q. Were you in this country generally before the sheepmen began to come in? A. Yes, sir.

Mr. PLATT.—I object on the ground he has not testified that he knew that any sheepmen ever came in. Counsel is assuming that knowledge on the part of the witness.

Mr. LEWERS.—The Court has taken judicial knowledge of conditions up there, to a very large extent.

(Testimony of Frank J. Button.)

Q. About when, as near as you can fix it approximately, without giving the exact year unless you are able to, did the sheepmen begin to come into this country in the vicinity of Squaw Valley?

A. They used to drive through there in the vicinity, and they never used to stop around the vicinity of there; in the forepart of the 70's there wasn't very many sheep that went in through that country. [438]

Q. When did they begin to stop in there and graze in there, approximately?

A. Well, along in the 80's.

Q. What was your purpose in making that trip around there that day, Mr. Button?

A. To see the country, and as a witness.

Q. And during that trip did you make any particular observations of the country as you went through it? A. I did.

Q. And I will ask you whether or not during that trip there was any discussion between you and others, concerning that country and its character?

A. Some, yes.

Mr. LEWERS.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Who asked you go to go up there? A. Sheriff Lamb.

Q. And were you told that you were wanted to go up there in order that you could testify in the case?

A. Yes, sir.

Q. Was any suggestion made to you by any of the company what you were going to find?

A. There was not.

(Testimony of Frank J. Button.)

Q. Was it said in the party that you would not find any gaps, or any high hills or barriers? A. No.

Q. It was not discussed at all?

A. No, it was not discussed.

Q. You didn't talk about it on the trip at all?

A. Not until after we got on the ground.

Q. When did you begin talking about it?

A. It was the next morning after we rode up through there.

Q. The next morning when you started to go across it? A. Yes, when we started to go.

Q. Was the suggestion made several times that you would not find any inclosure, and would not find any barriers, and that the country was open, and that the Government's suit was inadvisedly brought, and all that thing? [439]

A. Well, not by the gentleman that I went with. I have heard that outside.

Q. You have heard that outside, but it was not mentioned in the crowd at all? A. No.

Q. Do you entertain any prejudice at all against the Government in this matter?

A. None whatever.

Q. You want to testify to things as you saw them, don't you, Mr. Button?

A. That is all I propose to testify to.

Q. That is all you care about? A. Yes.

Q. And you want to testify to what you know to be so, regardless of what your feeling may be?

A. Well, I have got no feeling I assure you, against the Government.

(Testimony of Frank J. Button.)

Q. You are not biased one way or the other, are you? A. No, sir.

Q. Now, you have travelled over this country represented in the white here frequently, haven't you?

A. A good many times.

Q. And you know as a matter of fact, don't you, from the southwest of this so-called inclosure, from the southwest, going in a northeasterly direction, the country begins to get higher and steeper, does it not, all the time? A. Yes.

Q. It is much higher at the northeast end than it is at the southwest end, is it not? A. Certainly.

Q. And when you get up into this section shown on the plat as Toejam Mountain, it begins to get more mountainous than it was down here, does it not?

A. Certainly.

Q. Now, you would call this section represented in the blue, in the northeast, a mountainous section, wouldn't you? A. Yes.

Q. There are higher hills, mountains, around where Toejam Mountain is shown on the plat than there are further down? A. Yes. [440]

Q. As a matter of fact it is much more difficult to travel in that section shown in the northeast corner, than it is further down, is it not?

Mr. DENMAN.—I object to the question. What class of travel, horseback or how?

Mr. PLATT.—I am asking the witness whether or not it is more difficult to travel horseback, a-foot, or in a buggy than it is down in another part of the section? A. Why, of course the steeper it is.

(Testimony of Frank J. Button.)

Q. And it is more difficult to travel because it is steeper up there, is it not?

A. Yes, it is a little steeper.

Q. You could not drive a wagon or buggy through that country, could you? A. I could.

Q. You could? A. Yes, sir.

Q. What would enable you to do it?

A. I have driven wagons over a whole lot steeper country than that.

Q. You have driven over there?

A. Not at that particular point, but I have driven wagons over steeper places than that.

Q. But it was not a natural drive for a wagon, was it? A. No.

Q. It was a difficult drive, wasn't it?

A. Yes, I have taken some pretty difficult drives.

Q. But it is not a place one would ordinarily drive with a wagon, is it?

A. No, you would not have no business up in there with a wagon.

Q. You would not have any business up in here with a wagon, would you?

A. I don't suppose there would be anybody going up there with a wagon.

Q. Unless the man were venturesome, and it was a matter of necessity that he go up there with a wagon, he would not use a wagon in that country?

A. He would not have to be very venturesome to go up there. [441]

Q. Is it not quite steep up here? A. Not very.

Q. You would not call this section up in the white a mountainous section?

(Testimony of Frank J. Button.)

A. No, there is small hills there.

Q. But you would call this section of the country in the northeast quarter a mountainous country?

A. Yes.

Q. Now, why would you call this northeastern part a mountainous section?

A. Because it is higher.

Q. Is that the only reason, just because it is higher?

A. Well, the most of this country below there is a flat.

Q. Oh, I see. Most all this country below is a flat, and this is higher, is it much higher?

A. Well, it is quite a piece higher. You mean from the house up, or where?

Q. Yes, from the house up to this northeastern section. A. Yes, sir, it is quite a piece higher.

Q. And because it is quite a piece higher, you would call this a mountainous section as compared with any of this white within the inclosure, wouldn't you?

A. Yes. Well, no, there is some mountains in lower down—I say after you go up there a ways, before you go up to them high places there is some mountains in there, what I would term a mountain, or hills.

Q. These hills or mountains you say within the white are tending toward the northeast, is that true?

A. Yes, sir.

Q. But these mountains, or hills, or this country in the northeast, would be higher than these mountains or hills upon this land in the white, wouldn't they?

(Testimony of Frank J. Button.)

A. Yes.

Q. I don't want to misunderstand you or misquote your testimony, but you say you would call the north-eastern section a mountainous country, but there would be a few high places within the white you would call mountains?

A. There is quite a number of [442] mountains in it. You might say from the time you leave the dam all the way up there is mountains, and from Rock Creek Corral up there, there is mountains all the way.

Q. Would be mountains all the way from the time you leave the Willow Creek dam, tending up toward the northeast, is that true? A. Yes.

Q. And when you got up to this mountainous section shown in blue on the plat, then you would come to the higher mountains?

A. Yes, the further up you go the higher it is, it is a slope from the dam up.

Q. You never went along the fence line as shown upon the plat here, Mr. Button, until you made this last trip in that automobile, did you? A. Which?

Q. Did you ever make the circle of this fence?

A. No.

Q. Or go there with a view to examine it, before you made this trip in the automobile? A. No.

Q. And of course you don't know anything about the conditions of that fence from any actual knowledge until you made this last trip in the automobile, is that true? A. That is true.

Q. And so far as that North fence about which you testified, you don't know whether the storms of this

(Testimony of Frank J. Button.)

recent winter blew the fence down or whether somebody pulled it down?

A. Well, it looks to me, Mr. Platt, as if—

Q. I know what you—

Mr. DENMAN.—One moment.

Mr. PLATT.—I know what his opinion is, if the Court please, but I am asking him a straight question, calling for his knowledge.

Mr. DENMAN.—Our objection is that counsel interrupted the witness while explaining his answer, and that the witness should be permitted to go on and explain his answer without interruption from counsel. [443]

Mr. PLATT.—The question calls for a categorical answer. I asked whether he knew that the storms of last winter blew the fence down, or whether anyone pulled the fence down.

The COURT.—Well, read the question to the witness; and if you can answer yes or no, do so, then if you want to add anything, you will be permitted to do so.

(The reporter reads the question.)

Mr. PLATT.—(Q.) Now, you don't know that of your own knowledge, do you? A. No.

Q. You were not there? A. No, I was not.

Mr. LEWERS.—The witness started to make an explanation.

Mr. PLATT.—The witness started to give his opinion as to what he knew about it, and it is not testimony.

The COURT.—It seems to me that he did not get a

(Testimony of Frank J. Button.)

chance to answer the first question.

The COURT.—(Q.) Have you any explanation you want to make? Do you want to say anything further? A. Why, I would like to explain.

Q. Very well, explain.

A. Of course I don't know whether the wind blowed it down, or anything else, but the best of my judgment them posts has rotted off, and the fence has fell over, could not say whether they fell over this winter or some other winter, or when they fell over.

Mr. PLATT.—(Q.) You are giving that as your opinion? A. That is my opinion.

Q. Now will you give it as your opinion that the fence fell over this winter? A. No.

Q. Will you give it as your opinion that it did not fall over this winter?

A. Well, I don't believe it fell over this winter.

Q. Why don't you think so? [444]

A. Because it looks as if it had been over there quite a while.

Q. You saw a lot of snow there, didn't you?

A. Some places lot of snow, and some places not.

Q. You don't know as a matter of fact, whether somebody came and pulled the fence down, do you?

A. No.

Q. You could not testify as to that? Do you know how long North's fence is from the intersecting point in section 36 down to where the main fence intersects at what seems to be a section line?

A. This is North's fence (indicates).

Q. No; I mean this portion of the fence which I

(Testimony of Frank J. Button.)

am indicating with my pencil there.

A. Whose fence is that?

Q. It is shown on the plat to be North's fence.

A. Do I know how far it is?

Q. Yes, do you know how long that stretch of fence is?
A. No.

Q. Do you know how much of it was down?

A. Well, it was down in three or four places that I took particular notice; I should judge there was one place about 300 feet that laid over.

Q. Were the wires attached to the posts as the posts were laying upon the ground?

A. There was some of the wires attached to the posts.

Q. Was that in that open place of 300 feet there were wires upon the ground?
A. Yes.

Q. Where did you see any other gaps?

A. Well, I could not exactly tell just exactly the spots, I know I rode backwards and forwards through the fence twice.

Q. Were they large openings, aside from this 300 feet opening?

A. Oh, there was openings there, I would judge a couple of hundred feet.

Q. How far apart were they?

A. The openings?

Q. Yes. [445]

A. That I could not say, not a great distance apart.

Q. They were pretty close together, were they?

A. Well, some of them was.

Q. Were the wires upon the ground where those were open too?

(Testimony of Frank J. Button.)

A. The wires was upon the ground all except in one place; there was one place after you get pretty well down onto Toejam, the wires had been cut there, somebody or other, and throwed back against the posts.

Q. Did the wire look as if it had been cut?

A. Yes.

Q. You don't think there was a natural break in the wire, do you? A. Oh, no.

Q. You give it as your opinion that somebody cut the wire? A. Yes.

Q. Do you know in how many places the wire was cut?

A. Well, there was three wires, cut in three places; each wire was cut close to the post.

Q. And turned back?

A. They was turned back, yes, sir.

Q. How big an opening did that make, do you know? A. Oh, 50 or 60 feet, I think, about that.

Q. And of course you don't know who cut the wires? A. Oh, no.

Q. Or when they were cut? A. No.

Q. As I understand it, you don't know anything about the condition of the land as to feed and grasses, and so on, within this inclosure represented in the white, since the early 80's?

A. Well, I could see what feed there was when I went through there this time.

Q. Of course, you went through in February, didn't you? A. Yes.

Q. Last month? A. Last month.

(Testimony of Frank J. Button.)

Q. And you would not expect to find much feed then, would you? [446]

A. Well, if there had not been any stock in there I would expect to find some feed, not very much.

Q. When are the real feeding seasons?

A. Up in, sometimes it starts in the first of May, there is pretty fair feed, May and June, the low foot-hills, the feed generally dries up sometime in June.

Q. Well, have you any intimate knowledge at all as to what feeding was done within this inclosure after the early 80's, and up to the present time?

A. Not after 1883.

Q. And during the 80's you say, as I understood, there were a few months in the year these lands were used for feeding?

A. Yes, the cattle drifted up through there, but they generally run over the hills on Fraser Creek, in that way, there never was very many cattle in the flats in the early days.

Q. Not in early days? A. No.

Q. But you have seen cattle grazing within that so-called inclosure in early days, haven't you?

A. Yes.

Q. And I also understood you to say, Mr. Button, that sheepmen grazed their sheep in there in the early 80's?

Mr. LEWERS.—No, you misunderstood. It was as to when sheepmen began to come into the country generally.

Mr. PLATT.—I don't want to misunderstand you. You say sheepmen began to come into the country

(Testimony of Frank J. Button.)

generally in the early 80's?

A. In 1882 there was a couple of bunches of sheep on Fraser Creek, they was there when we rodeoed in the spring; and it might have been along in 1879 that I see a bunch of sheep in there; it is quite a while ago to remember.

Q. But your recollection is as early as 1879 you saw sheep in this white?

A. No, you misunderstand me; over on Fraser Creek.

Q. But you personally have never seen any sheep within this inclosure? [447]

A. I have seen sheep drove along that road, along the Squaw Valley road.

Q. You mean the road indicated upon the plat beginning at Opening No. 1, running a diagonal line going easterly?

A. No, it would run on the west side of the Squaw Valley field most of the way.

Q. On the west of this plat? A. Yes.

Q. Then you cannot testify as to having seen any sheep within that inclosure, at all, can you?

A. No.

Q. What is the condition of the country just on the outside rim of the north side of this inclosure?

A. Why, it is a flat country through there for quite a ways, with sagebrush, just about the same as all through the State of Nevada, sagebrush; there is a little feed grows in among the sagebrush.

Q. But it is generally a flat country, is it, along there?

(Testimony of Frank J. Button.)

A. Well, yes, there is a flat country up there for a ways, until you strike the hills; it is several miles, I think, over to the hills.

Q. What is the general condition of the country outside of the northwest border of this plat, or this so-called inclosure?

A. Well, that was what I was talking about, from the north or northwest.

Q. And from the northwest you say it is a flat country? A. Yes.

Q. How is it directly north?

A. Well, you strike the mountains there; there is a big range of mountains all through that country.

Q. As a matter of fact, don't you begin to strike the mountains when you get toward the neighborhood of Toejam Mountain?

A. Yes, right where Toejam comes in. [448]

Q. Now, about where does Toejam Mountain come in?

A. I am not talking about the mountain; creek.

Q. Oh, creek? A. Yes.

Q. Where does Toejam Creek come in?

A. Comes in just above the corral there on Rock Creek.

Q. Can you indicate how far from the intersection of North's fence the Toejam Creek begins?

A. The north end?

Q. No, North's fence. A. North's fence?

Q. Yes; how far to the west of North's fence does the Toejam Creek begin—well, I withdraw that. Can you indicate upon the plat where the mountain-

(Testimony of Frank J. Button.)

ous country begins to the north? A. Yes.

Q. Well, I wish you would do that, Mr. Button?

A. If you will show me the corral.

Q. The corral is not indicated upon the plat, but here is Rock Creek running up in a northeasterly direction (indicates).

A. Now, where is Toejam?

Mr. LEWERS.—There is Toejam and there is Rock Creek.

Mr. PLATT.—Toejam is not indicated in so many words on the plat.

A. Well, this is where Toejam Creek comes in; I could not say how far it is up here, but when you get up here to about where Toejam Creek comes in, where there is a corral there—it is 12 miles from the house up to where the steep mountains commence.

Q. Twelve miles? A. Yes.

Q. Do those steep mountains commence, do you mean, 12 miles toward the east, or 12 miles toward the north?

A. Twelve miles from the south. From the Dutton house up to Rock Creek corral.

Q. In what direction?

A. Well, it would be northeast from there. [449]

Q. Northeast?

A. I should judge, pretty near north.

Q. Pretty near north?

A. The house would be, I should judge; of course, I could not be accurate.

Q. Well, there is no mistake about this mountainous country beginning from Toejam Creek, is there?

(Testimony of Frank J. Button.)

A. No, the mountains commence to get higher, the hills.

Q. As they advance along to where Toejam Mountain is, they reach their extreme height, don't they?

Mr. LEWERS.—We object; there is no testimony there is any such thing as Toejam Mountain.

Mr. PLATT.—Well, it is called Toejam Mountain, if the Court please, and has been called it all through the trial.

Mr. LEWERS.—There is something on this plat called Toejam Mountain that no witness except Flocker has ever seen.

Mr. PLATT.—(Q.) Did you ever hear of Toejam Mountain, Mr. Button? A. Never did.

Q. Have you ever heard of Toejam Creek?

A. Quite often.

Q. Have you heard of the Toejam Mountains?

A. No.

Q. What is the name of these mountains about which you just testified?

A. We always called them the Rock Creek mountains.

Q. Call them the Rock Creek mountains?

A. Yes.

Q. Now, what is the condition of the country just to the south of this fence line, I mean of the south side fence line?

The COURT.—South of Willow Creek.

A. What do you mean, down from the house?

Mr. PLATT.—No, I mean all along Willow Creek here, down south from it, all along the line of this

(Testimony of Frank J. Button.)

fence; what is the general condition of that country?

A. Well, it is a flat country for quite a ways through there, and then it comes up into the mountains.

Q. Does it come up into the mountains the further south you go [450] or further north you go?

A. Either way you go you would come into the mountains.

Q. How long a distance from Willow Creek itself is the country flat, going south?

Mr. DENMAN.—Whereabouts on Willow Creek?

WITNESS.—I would like to know from what point on Willow Creek.

Mr. PLATT.—Well, the general condition of the country all along south of Willow Creek?

A. Willow Creek runs for a long ways, it is a long creek; if I remember right, it runs down into a lake there; it used in early days; then it runs away up in the mountains, away up past the reservoir for a number of miles.

Q. Mr. Button, would it be very difficult for anybody to herd cattle or graze sheep across the country south of Willow Creek, so as to get up to Willow Creek?

Mr. DENMAN.—Object to that as not proper cross-examination, your Honor.

Mr. PLATT.—If the Court please, one of the first questions asked this witness was as to whether he did not make this trip for the purpose of looking at the country, and he said that he did.

The COURT.—I understand, Mr. Platt, and I

(Testimony of Frank J. Button.)

would like to hear that myself, but the question is whether that is strictly within the limits of cross-examination. As I understand, he commenced his examination above the reservoir at Opening No. 6, and then went up along the east boundary of this territory to the end of North's fence and down to where Toejam comes into Rock Creek. I don't remember any direct examination that they went over any other territory.

Mr. PLATT.—(Q.) Now, Mr. Button, you said, didn't you, in direct examination, that you made this trip for the purpose of [451] looking at that country, and that you did look at the country and examine it? A. Yes.

Q. That is what you were instructed to do, was it not?

Mr. DENMAN.—What country do you refer to, Mr. Platt?

Mr. PLATT.—The country all around the fence, you indicated upon the plat. Do I understand you right?

A. I don't know whether I understand you right or not.

Q. Were you instructed to examine all the country around near or in the neighborhood of this fence shown upon the plat?

A. Well, I was not instructed to do anything.

Q. Oh, you were not? A. No.

Q. You say Sheriff Lamb told you to go, didn't he?

A. Asked me if I would go.

Q. What did he say to you?

(Testimony of Frank J. Button.)

A. He said he would like to have me go up there as a witness for Mr. Kent; he said there was lots of fellows that would like to go, but he said he wanted some good, reliable man that would go up there and look the situation over. I thanked him very kindly for getting the job.

Q. What situation did he explain to you to look over?

A. He said the Government had sued Mr. Kent for fencing land.

Q. And you went to look over the fence, didn't you, and the conditions surrounding the fence?

A. I went to look over the fence; I suppose that is what I went there for.

Q. Didn't you look at this country south of there?

Mr. DENMAN.—Object to the question as not cross-examination.

Mr. PLATT.—I will take the Court's ruling; I want to get it out of this witness, if I can.

The COURT.—If they object, I cannot allow you to go over any other territory than they described during direct examination; and that I think was between Opening No. 6 and the junction of Rock Creek and Toejam Creek. [452]

Mr. LEWERS.—Going up there on a hurried trip in an automobile, naturally he could not examine that country, and we did not examine him on it, because the purpose, as is obvious from the testimony, was to get that upper end.

Mr. PLATT.—(Q.) It was a hurried trip, was it not, Mr. Button? As a matter of fact, you left some-

(Testimony of Frank J. Button.)

where about Opening No. 1 at about 8 o'clock in the morning, and you started your return trip, didn't you somewhere around about half-past one the same afternoon?

A. I think it was about 7 o'clock, maybe it was a little earlier.

Q. And you started to leave there about 1:30 in the afternoon, didn't you?

Mr. DENMAN.—Leave where?

Mr. PLATT.—Leave the inclosure to start back.

Mr. LEWERS.—We object on the ground it is too vague and indefinite; there is no inclosure identified, and even if there were it would not show what part of it.

Mr. PLATT.—(Q.) You finished examining what you went for, didn't you, at 1:30 in the afternoon?

A. Well, they did not tell me I was through.

Q. When did you get through making your observations so you could come here to testify, Mr. Button; I want to know the fact, that is all?

A. Well, *where* we ate our lunch and started for Golconda, I think it was 2 o'clock.

Q. Where did you eat your lunch?

A. Where there used to be an old corral on Rock Creek; there is a sheep corral there now.

Q. And after you had eaten your lunch and started for Golconda, it was only 2 o'clock?

A. I think that was the time, might have been a little later.

Mr. PLATT.—That is all. [453]

Mr. LEWERS.—(Q.) And that was about what

(Testimony of Frank J. Button.)

distance above Dutton Ranch at that time?

A. Twelve miles, I think they call it.

Q. Now, you say that when you were in there in early days there was very little grazing on that interior portion represented on this plat here, is that correct? A. That is correct.

Q. Why?

A. Well, there was more feed everywhere for the stock to get.

Mr. LEWERS.—That is all.

(Court adjourned until Monday, March 11th, 1912, at 10 A. M.) [454]

Monday, March 11th, 1912, 10 A. M.

Mr. DENMAN.—If the Court please, two or three days ago, we made a demand on the Government for the first map made by Mr. Flocker, in their possession. Can you let us have it, Mr. Platt?

Mr. PLATT.—Well, I have not made an examination to see whether I have it or not, but I will to-day.

Mr. DENMAN.—We want it before we close our case. It is the map you showed me last June. I am referring to the map you showed me in our negotiations of last June, the 9th or 10th.

[**Testimony of R. E. Tilden, for the Defendant.**]

R. E. TILDEN, direct examination resumed.

Mr. LEWERS.—(Q.) Taking up your examination about the point where we left, Mr. Tilden, will you state generally how many times you have been in the vicinity of the eastern and northeastern part of the territory represented on Exhibits 1 and "A"?

A. Up there twice.

(Testimony of R. E. Tilden.)

Q. And did you make any survey of any of that territory on the first occasion when you were up there? A. I did.

Q. Now, when was that, Mr. Tilden?

A. The latter portion of November, 1911.

Q. And the second occasion, as I understand it, was when you went up there with Mr. Lamb, Mr. Button, Mr. Sheehan, myself and Mr. Petrie, is that correct? A. Yes, sir.

Q. Did you on any of those occasions make any surveys or observations for the purpose of determining the elevations of the ground in that vicinity?

A. I did.

Mr. PLATT.—If the Court please, I desire to state to your Honor and to caution counsel, that I am going to object to leading [455] questions, if counsel persists in asking them.

Mr. LEWERS.—(Q.) Just state what you did in reference to elevations.

A. Well, during the survey I took distance, course and elevation of the ground from a point at the lane below the reservoir easterly and northerly up Willow Creek and Siawappe, up to the arrow there shown at Opening No. 5, and on up Toejam Creek.

Q. Now, Mr. Tilden, will you step down and indicate on the plat, either exhibit 1 or "A," just where you took those elevations.

A. If this little creek is drawn correctly—

Q. Which little creek?

A. This little branch right in here.

The COURT.—That is Hot Creek?

(Testimony of R. E. Tilden.)

A. No, sir; that is kind of a warm spring coming out of the mountains there.

Mr. DENMAN.—That is Hot Creek, then?

A. No, this is Hot Creek here; this is just a little spring there on this map; it is in the west half of section 28, township 39 north, range 48 east. (Exhibit No. 1.)

Q. Now, proceed.

A. This is the end of a lane, passing through this country; thence in an easterly direction around the south side of the reservoir, on up Willow Creek and Siawappe Creek, and passing Nelson's fence, on up to what is called the summit or Opening No. 5; thence in a northeasterly direction up Toejam.

Q. Now, did you keep any record of your observations as to elevations? A. I did.

Q. Have you that record with you?

A. My field-book on the desk.

Q. Will you kindly produce it? Now, what is that book that you hold in your hand?

A. It is a field-note book for copying notes in, and book No. 9. [456]

Q. When were the entries in the book made?

A. The first entry is November 23d, 1911, Friday.

Q. Was it made at that time?

A. Yes, sir; the notes were.

Q. What I want to get at, Mr. Tilden, is whether or not that book contains the record that you made as you were making this survey? A. It does.

Mr. PLATT.—If the Court please, I object to the question on the ground it is leading. As I under-

(Testimony of R. E. Tilden.)

stand, the survey was made on the 11th day of November, 1911.

WITNESS.—Beg pardon, the 23d.

Mr. PLATT.—If he made the survey on the 23d, and the notes were made on the 23d; those are facts to which the witness may testify.

Mr. LEWERS.—I withdraw the question if counsel objects. I was trying to shorten the examination.

Q. When were the other entries made in that book?

A. They were made continuously on, day after day.

Q. During what time?

A. November,—I can give you the dates starting and ending. From November 23d to December 2d.

Q. And where were you when you made those entries?

A. On the Willow Creek, Siawappe and Toejam Creek.

Q. When were those entries made with reference to the time you were making this survey you have testified to? A. When were they made?

Q. Yes.

A. Made during the progress of the survey.

Q. Now, Mr. Tilden, will you state, beginning at the point you have indicated at the lane below the reservoir, and following up as far as you took your elevations, what those were?

A. The elevations?

Q. Yes.

A. Well, to start with, we assume an elevation, not knowing the sea-level elevation, at the township corner, [457] about half a mile north of Dutton

(Testimony of R. E. Tilden.)

postoffice, as 200, and from this assumed elevation all the rest of the elevations are based upon it. The elevation at the beginning of the lane just below the reservoir, that small creek there, is 364.9, or call it 365 feet.

Q. That is on the basis of this assumed elevation of 200 at the township corner, is it? A. Yes.

Q. Proceed.

A. Where do you want the next one?

Q. Just as you went along following up the creek.

A. There is quite a number of them.

Q. What was the elevation at Opening No. 6?

A. I have *not it* worked out right at the corner, but I have it worked out on the ridge above, the bench above it, it would be half a mile south of that little mesa on top; I have not the elevation worked out at the creek.

Q. Where is this bench, will you indicate on the map?

A. Along in here some place (indicates).

Q. "Along in here some place" don't mean anything; indicate by section.

A. In the south half of section 31.

The COURT.—That would be about half a mile from opening No. 6?

A. I should think it would be a little less than half a mile south.

Mr. LEWERS.—(Q.) What was the elevation?

A. 524.

Q. Now, in order that the record may be clear, how much higher was that than your starting point?

(Testimony of R. E. Tilden.)

A. 159.

Q. You mean 159 higher than the lane?

A. Than the beginning of the lane, or west end.

Q. Did you take any elevation anywhere near the east opening or east end of Opening No. 6?

A. Of the end of Opening No. 6?

Q. Yes. [458]

The COURT.—I thought that was the one he had just given?

Mr. LEWERS.—The one he just gave was south of the opening?

A. Yes, sir.

Q. Where? Will you describe the point, and describe it so the record will show it?

A. About, it seems to me to be about on a scale of 500 feet, southeast of the corner.

Q. Of what corner?

A. Of the east side of the opening, that would be in the northwest quarter of section 32.

Q. And what was that elevation? A. 527.

Mr. PLATT.—If the Court please, I don't want to cross-examine the witness upon this particular question, and I suggest to counsel that I would like to know how near the opening itself that elevation was taken, in order that I may get as nearly as possible the exact location of it?

The COURT.—Five hundred feet southeast.

Mr. PLATT.—From the opening itself?

Mr. LEWERS.—From the east end.

Q. From the east end of the opening?

A. Yes, sir; that is as near as I can get at it.

(Testimony of R. E. Tilden.)

Q. Now, Mr. Tilden, going north from there, and calling your attention to section 20, did you take any elevation in there? A. I did.

Q. At what point?

A. On top of the highest portion of the ridge in there, near where the fence crossed the ridge and went down into the valley.

Q. And what was that elevation? A. 895.

Q. And will you describe briefly what is there at the point where you took that elevation?

A. The fence line.

Q. Well, I mean so far as the natural configuration of the ground is concerned? [459]

A. A few rocks, sagebrush, very little grass; it is a rolling country similar to the east.

Q. State whether or not you took that elevation in a hollow or hill, or where, is what I want?

A. On a ridge.

Q. And with reference to the surrounding country immediately adjacent to the point where you took that elevation, how does it compare in height?

A. Much higher.

Q. Did you take any other elevation near that to the north or to the south, right close to it?

A. One to the northeast in the valley.

Q. Will you indicate on the map just where that was? A. Right about here (indicating).

Q. Where is "about here," describe?

A. It is near the quarter corner between 17 and 20, township 39 north, range 49 east.

Q. What was that elevation?

(Testimony of R. E. Tilden.)

A. 664, bottom of the valley.

Q. Now, going farther north to what is denominated on the exhibit as Opening No. A, did you take any elevation near that point? A. I did.

Q. And how near it?

A. I had one right in the opening.

Q. Well, what is that elevation? A. 821.

Q. Now, going north from Opening No. A, did you take any further elevation? A. I did.

Q. Will you indicate where you took those, describing so the record will show?

A. Northeast quarter of section 8, township 39 north, range 49 east.

Q. And what was that elevation? A. 1023.

Q. Now, will you indicate on the map where that was? A. On the top of the highest portion.

Q. Describe what it was. [460]

A. On the top of a ridge, the top of the highest ridge in that vicinity.

Q. Then where did you take the next elevation?

A. 36.

Q. What do you mean by 36?

A. I mean northwest quarter of section 4.

Q. Now, referring to exhibit "A," is the point marked on exhibit "A" where you took that next elevation? A. It is.

Q. How is it marked?

A. By a square with a dot in the middle, marked 36 in figures.

Q. What does that 36 mean?

A. The number of a station.

(Testimony of R. E. Tilden.)

Q. Number of your survey station?

A. Survey station.

Q. And what was the elevation there?

A. 1320.

Q. And where was your next elevation?

A. At 37, marked by a similar symbol.

Q. On exhibit "A"? A. On exhibit "A."

Q. And what was that elevation? A. 1198.

Q. And where was your next station?

A. At a similar symbol as stated before, marked

38.

Q. Is it where I have my pointer?

A. Yes, sir, northeast quarter of section 32, township 40 north, range 49 east.

Q. And what was the elevation there? A. 1273.

Q. And where was your next station? A. At 39.

Q. Where is 39?

A. On the side of the left top bank of Toejam Creek, down below the top of the bank, northeast quarter of section 32, township 40 north, range 49 east.

Q. What was that elevation?

A. Station 39, 1240.

Q. And where was your next station?

A. At a similar symbol just beyond the fence line.

Q. What fence line?

A. What is called North's fence or Noble's fence, northeast quarter of section 32 near the bottom of Toejam Creek, marked by number 40. [461]

Q. And what was that elevation? A. 1128.

Q. And where was your next station?

(Testimony of R. E. Tilden.)

A. Well, we had several stations along between 40 and the branch going up this way.

Q. What do you mean by "branch going up this way"?

A. It is an elevation.

Q. Well, is it represented on the map?

A. It is.

Q. At what point?

A. At the southeast quarter of this section, section 28.

Q. What is the number of that station on Exhibit "A"?

A. 46-B.

Q. And what is that elevation?

A. That would be 1324.

Q. Now, calling your attention again to exhibit "A," did you take any elevations in that vicinity?

A. I did on the top of a hill.

Q. Where is that hill?

A. Five thousand four hundred feet northeast of station 37 shown on map.

Q. And where is station 37 on map?

A. Southeast quarter of section 32, township 40 north, range 49 east.

Q. Will you take the pointer and indicate where station 37 is; and is the hill which you have referred to represented on that map?

A. It is on exhibit "A."

Q. And how is it marked?

A. By an irregular line with hatches deviating from it in a southerly, westerly and northerly direction.

Q. Is it marked in any other way by any symbol?

A. By a cross and the word "hill."

(Testimony of R. E. Tilden.)

Q. Now, what is the elevation of that point marked on that hill?

A. Two thousand and forty-seven feet, with reference to the other elevations.

Q. Now, will you describe that hill?

Mr. PLATT.—Will your Honor permit me again, in order that I may get this? Will you state again just where your elevation reached 5,400 feet? [462]

A. This mark as shown there with the cross on it.

The COURT.—(Q.) Is that the elevation?

A. That is the point which marks the elevation.

Mr. LEWERS.—(Q.) What is that elevation?

A. The elevation in numbers?

Q. Yes. A. Two thousand and forty-seven feet.

Mr. PLATT.—(Q.) Didn't you testify as to an elevation on top of a hill somewhere, 5,400 feet?

A. Distance.

The COURT.—It was 5,400 feet distance from that point.

A. In that northeasterly direction.

Q. And 5,400 feet distant from what?

A. From station 37.

Mr. LEWERS.—(Q.) State the elevation of that hill again, so there will be no question about it.

A. The top of the hill was 2,047 feet.

Q. Now proceed and describe that hill as far as you can, giving its dimension, appearance, course, and whatever you may have noticed about it.

A. The west end of the hill, the real top of the hill, I should say it is about 2,000 feet north and south, maybe not that much, maybe it is less, I never took

(Testimony of R. E. Tilden.)

real actual measurements, and the hill extends in a northeasterly direction, sloping southerly, westerly and northerly.

Q. Extends in what direction?

A. Extending in a northeasterly direction, shown in the way I point; it is the end of a ridge, what it really is.

Q. With reference to Toejam Creek how does that hill run? A. In a northeasterly direction.

Q. Well, with reference to Toejam Creek how does it run? A. On the south side of it.

Q. Does it run at right angles, parallel, or how?

A. Parallel.

Q. And will you describe as fully as possible the character of [463] the ground to the north of that hill, between it and Toejam Creek?

A. Having a slope from the mountain gradually down to the Toejam Creek on a grade of about 17 per cent.

Q. Upon what do you base that statement, that it has a grade of about 14 per cent?

A. Actual observation and calculation.

Q. What is the starting point of your grade?

A. An elevation in the southeast quarter of section 38.

Q. On Toejam Creek?

A. On Toejam Creek, at the top of the left bank, not the bottom of the bank.

Q. Where was the other end of that grade on the hill? A. On the top of it.

Q. And what was the grade, if you know, from the

(Testimony of R. E. Tilden.)

bank of Toejam Creek to the base of that hill?

A. I don't know, I should think it would be very much less than 17, because I took the highest width of the hill.

Mr. PLATT.—(Q.) Well, did you take it?

A. I did not.

Q. Then you don't know.

A. It is bound to be less than 17, because it is lower down.

Q. Now, will you describe the ground to the south of that hill down toward what is marked on exhibit "A" as "North Fork"?

A. It has a slope slightly steeper than towards Toejam.

Q. And what grade is that?

A. Twenty per cent, or a rise of 20 feet in a hundred.

Q. And was that taken from the same point on top of the hill?

A. Same point, to point near corner of Nelson's fence shown on exhibit "A" near the south quarter corner of section 33.

Q. Now, you have described the grade both to the north and to the south of the hill; will you describe more fully the character of the ground, as to its surface features?

A. On the south side of the hill there is a small ravine running up from Nelson's fence, up towards the top of the hill, up and [464] down.

Q. What do you mean by up and down?

A. Undulating.

(Testimony of R. E. Tilden.)

Q. How on the north side?

A. On the north side is the same character, except the ravines have a more rounding slope on the bottom, and the top of the ridges have a more rounding slope, as well as to say it is a more rounding country.

Q. On the northerly?

A. On the northerly side.

Q. Did you notice anything else concerning the surface of the ground on either side, if so, describe it?

A. Well, it is sagebrush, a few stones around there, rocks or blow-outs, or whatever you might call them.

Q. Describe those, how extensive are they?

A. I should not think some of them more than 10 feet high and 25 feet across.

Q. And how frequently do they occur?

A. I don't think they occur very often. I saw one just a little above this southeast quarter of section 28, up the stream.

Q. Near what station? A. Near station 46.

Q. Now, Mr. Tilden, will you describe the character of the ground in what is marked as Opening No. 5?

A. From what point?

Q. From the two arrow points right across.

A. Well, it is a slightly rolling country; there is a ridge or a table-land right in here.

Q. Right in where?

A. In the north half of section 5, and from this point towards the east quarter corner of section 32, it is a depression, or going down, and the grade would be about, well, give it its extreme limit, 4 per cent.

Q. Well, go on and describe right up through that

(Testimony of R. E. Tilden.)

opening, clear up to the hill.

A. From this point on around in a northeasterly direction up Toejam, to a point opposite the east quarter corner of section 28, it is undulating country, easy of access, [465] both driving cattle or riding.

Q. What is the grade up through there?

A. I should think it would be not over 5 per cent or 6 per cent.

Q. You mean 5 feet in 100 by that, do you?

A. Five feet in 100 or 6 feet in 100.

Q. Now, taking a point in Opening No. 5, midway between the two arrows, or in that vicinity, what would you say is the grade from there to the left, or to the bank of Toejam Creek, up near station 46, or in that vicinity?

A. From this point, not over 5 per cent, I should think.

Q. And taking that same point midway in that opening marked on the plat as $1\frac{1}{4}$ miles, and going easterly to the south side of the hill in section 34, what is the grade there?

A. How near the fence, you can get any grade you want in there.

Q. Well, say along the Nelson fence, first close to the fence. A. Well, 6 per cent.

Q. And what would be the grade there from the same point up to a line right below the base of that hill, on the south side?

A. About 12 or 14 per cent.

The COURT.—(Q.) That is from the middle of 5 to the base of the hill on the south side?

(Testimony of R. E. Tilden.)

A. Yes, sir.

Q. Twelve or 14 per cent? A. Yes, sir.

Mr. LEWERS.—(Q.) And what would be the grade from that same point to the base of the hill on the north side?

A. I could not see around that side so I never took any.

Q. Well, could you see any portion of that north side? A. No.

Q. Why?

A. I was too low, this point was much lower than this, it was sloping down, you know.

Q. Now, I call your attention to exhibit 1, to a long irregular symbol, labelled "Toejam Mountain," and marked on the legend as [466] "Natural Barrier," and running from the northeast corner of the quarter of section 32, down through section 33, and through the southwest quarter of section 34, down to what is marked the "North Fork," did you see that object? A. Did I see that object?

Q. Yes. A. I did not.

Q. Is it there? A. I never saw any.

Q. Well, the question is, is it there?

A. I should not think it was when I never saw it.

Q. Describe that ground.

Mr. PLATT.—I ask that the answer be stricken out on the ground it is not responsive to the question.

The COURT.—Oh, I will allow the answer to stand.

Mr. PLATT.—Exception, if the Court please, on the grounds stated.

(Testimony of R. E. Tilden.)

The COURT.—Let the exception be entered.

Mr. LEWERS.—(Q.) Now, Mr. Tilden, calling your attention to the beginning of that so-called Toejam Mountain barrier in section 32, will you, beginning at that point, and going clear through that alleged barrier, describe the ground where it is represented to be on the map?

A. From this point on the hill near the west quarter corner of section 34 to the end of this so-called Toejam Mountain, it is—

Q. Which end?

A. To the west end of Toejam Mountain, situated in the northeast quarter of section 32, it is a slightly sloping ground on a grade of about 15 per cent.

Q. Describe the surface of the ground, what it is like, just as fully as you can.

A. Well, it has small ravines, an easy slope, easy of access, ride a horse up it very easy, or ride a horse north and south or east and west, up that portion.
[467]

Q. Well, describe it as to rock, or anything that is there.

A. Sagebrush; I never saw any rocks in there at all.

Q. Anything besides sagebrush?

A. Sagebrush and undulating ground.

Q. For how long a distance does that undulating ground extend? A. Which way, westerly?

Q. In any direction.

A. A mile; from this portion to the west it is a

(Testimony of R. E. Tilden.)

mile, and as you go along it would be 12 miles.

Q. In what direction?

A. Southwesterly direction.

Q. How about east and northeast?

A. I never went in the easterly portion, but in the northeasterly portion it is undulating, easy of access.

Q. How wide is that strip north of the hill, and between the hill and Toejam Creek?

A. About three-quarters of a mile.

Q. Now, going south on this alleged barrier from the hill that you have marked on exhibit "A," describe that ground down to the North Fork.

A. Well, I personally never entered that country, but my rodman did.

Q. Describe what you saw.

A. The same country as I saw through here, intercepted with ravines, small ravines, undulating country.

Q. How close were you to it?

A. Station 37 and 36.

Q. And from where you were at those stations, could you see that ground?

A. Yes, sir, very well, beside better with the instrument.

Q. Did you examine it with the instrument?

A. I did.

Q. State what its surface was, as you looked along it with the instrument from the position where you were.

A. An undulating country, interspersed with ravines, easy of access, covered with sagebrush.

(Testimony of R. E. Tilden.)

Q. Mr. Tilden, what is the character of the ground in the east half of section 33, immediately to the west of what you have marked as a hill?

A. A very easy slope, some places, and level at the bottom of the draw.

Q. Describe what you saw or what there is there in the way of rock of any kind, before you reach that hill, or on either side where that barrier is purported to be. A. From what point?

Q. I don't care what point you observed it from; but what is there along where that barrier is alleged to be in the way of rocks?

A. There is a small rocky hill about 15 feet high near point marked station 38, situated in the north-west quarter of section 33, a few small outcrops of rocks.

Q. Describe it fully.

A. Covered with sage; that is about all I can say for it, undulating.

Q. Well, how big is it?

A. About 10 feet high, maybe 15 feet across.

Q. How far does it extend toward the southeast?

A. Well, it did not run southeast, it runs north-east and southwest, I suppose 30 feet. There is also between 37 and 38 another small outcrop, situated near the east quarter corner of section 32.

Q. What is that, describe it?

A. I suppose that is similar to the one I have just described, it is a round outcrop of rocks.

Q. How big?

A. I suppose 30 feet on top, and maybe you might

(Testimony of R. E. Tilden.)

call it 30 feet in diameter.

Q. What is the distance between those two?

A. Easy of access all around.

Q. Well, how far is it from the other outcrop you described just a moment ago?

A. Not over 600 feet or 800 feet.

Q. What is in between them? A. A low valley.

[469]

Q. Now, going right straight across, and confining your attention to the territory covered by these dotted lines, labelled "Toejam Mountain," as shown on exhibit No. 1, describe that surface just as you followed right across, beginning at the west end of that left barrier, and going down to the other end, as to the rocks there, what is there?

A. The real actual position, as shown on this map, would be right up a little low valley; that would be a little low valley running up here.

Q. That is where that Toejam Mountain is represented on exhibit 1, do you mean?

A. Yes, sir, which would be the same thing as on exhibit "A."

Q. And you say that is what?

A. Right up a little low valley. Of course I took elevations along that valley for the purpose of seeing if a canal could be brought over from Toejam to Siawappe.

Q. Now, what is beyond that valley?

A. Undulating country, in a northeasterly direction.

Q. I mean the very first thing you come to on the

(Testimony of R. E. Tilden.)

other side of that valley, describe it, what is it?

A. A slight rise, about 5 or 6 per cent, running in a northeasterly direction, undulating country covered with sagebrush, sagebrush and rocks occasionally.

Q. What kind of rocks?

A. Some of them are granite and porphyry.

Q. I don't care for the material. How are they built in there?

A. They are small blow-outs, sometimes 300 or 400 feet apart, or 500 feet apart.

Q. And how large were they?

A. Oh, 10 feet in diameter; that would not mean 10 feet all solid rock, 10 feet of rock points.

Q. And how high?

A. Five or six feet high. [470]

Q. What is in between them?

A. Sagebrush, undulating country.

Q. What kind of ground, without reference to what is growing on it, what is in between them?

A. Just the ordinary ground, as one would strike along in this country, the southwesterly country.

Q. Could you pass through it? A. Oh, yes, sir.

Q. And how about a team or wagon?

A. Travel with a team or wagon very easily.

Q. Now, what is the slope of the country going in a southwesterly direction from station 37, which is near the middle of Opening No. 5?

A. Slightly undulating country, up and down hills.

Q. But the average grade is in which direction?

A. Average grade in a southwesterly direction.

Do you want to know the per cent grade?

(Testimony of R. E. Tilden.)

Q. Yes, what is the average per cent grade in that direction? A. From this point to where?

Q. From station 37 down towards the southwest, three miles we will say.

A. Five per cent grade would be a high maximum, would be the limit, major grade would be 3 per cent.

Q. Going from station 37, near the middle of Opening No. 5, toward the northeast, what is the grade?

A. Five or 6 per cent.

Q. Mr. Tilden, have you ever had any experience in railroad surveying? A. I have.

Q. Where?

A. Assistant engineer for the Union Pacific system for two years; and built 20 miles of railroad for the Chicago Northwestern in 1899; assistant chief or principal resident engineer for the Tonopah and Goldfield Railroad in 1904 and 1905, which I really actually constructed on account of the chief engineer being sick. [471]

Q. Tonopah and Goldfield Railroad?

A. Tonopah and Goldfield Railroad, 1904 and 1905. Chief engineer of the Ohio Western in which we built 32 miles of grade, standard road; locating engineer for the Wheeling and Lake Erie Railroad in 1900, and locating engineer for the Union Pacific.

Q. Now, Mr. Tilden, what sort of a grade are railroads actually constructed upon, so that they can be operated, the maximum?

Mr. PLATT.—Object to the question on the ground it is incompetent, irrelevant and immaterial.

The COURT.—I think it is immaterial.

(Testimony of R. E. Tilden.)

Mr. LEWERS.—(Q.) Now, Mr. Tilden, calling your attention to the hill that you have described, and which is marked by the word “hill” on Exhibit “A,” I will ask you whether or not that hill closes, and if so to what extent, the territory between Toejam Creek on the north, and the North Fork of Siawappe on the south?

Mr. PLATT.—Same objection, that the question is leading, if the Court please.

The COURT.—I will allow that question; you may have an exception.

A. This hill or ridge runs in a northeasterly direction parallel to Toejam Creek, on the south side; and as I never went any further than the point, as I have stated before, marked 37 and 36 on that map, I could not say.

Q. That is not the question, Mr. Tilden. The question is—

The COURT.—Read the question.

(The reporter reads the question.)

A. As I observed, it didn't close, it was a continuous ridge.

Mr. LEWERS.—(Q.) A continuous ridge running which way?

A. In a northeasterly direction parallel to Toejam Creek.

Q. Now relatively, how much of the space north and south between [472] the two creeks does it cover?

A. I could not say. I didn't measure the top of it any further than this point right here.

(Testimony of R. E. Tilden.)

Q. Calling your attention to the north and south line as represented on exhibit "A" and exhibit 1, from North Fork up along that section line between 33 and 34, up to Toejam Creek, how much of that space in between does that hill cover?

A. As shown on exhibit "A"?

Q. In fact?

A. It would not cover over 2,500 feet, maybe 3,000, probably not that much.

Q. And out of a total distance of how much?

A. Of a mile and three-quarters.

Q. Now, I call your attention to what is marked on both plats as North's fence, sometimes referred to as Noble's fence; when did you first observe that fence? A. The latter portion of November, 1911.

Q. And did you make any examination of that fence? A. I did.

Q. Describe just what examination you did make.

A. While making the survey, I took the openings as I passed by them, noticed the gates if they were down or up, counted the number of wires, and noticed the kind of wire, new or old, noticed where the wire was cut by shepherders, or whoever may have cut it, or whether the wire had fallen down of its own accord; and also the condition of the posts.

Q. Will you describe that fence, as to what it is made of first? A. The majority of the fence—

The COURT.—Before he goes on to that, I would like to ask a question about these mountains. (Q.) Will you indicate on the map, the upper map (Exhibit No. 1) about the course of the ridge which runs

(Testimony of R. E. Tilden.)

through the opening, mark it in pencil.

A. The ridge, that runs east and west, well north-east and southwest. [473]

Mr. DENMAN.—Opening No. 5?

The COURT.—Opening No. 5. Just mark it in pencil.

(Witness marks course on Exhibit No. 1.)

A. I suppose it continues on up that way.

Q. Mark it clear through the whole length of it as far as you observed it. Where is the southwest end of the ridge?

A. Near the west quarter corner of section 34.

Q. Are there any ridges down in the territory surrounded by the blue? A. No, sir.

Q. Are there any ridges running northwest and southeast?

A. Northwest and southeast? Never saw any, no, sir. The only thing I wish to say is, that as in every creek there is a bank on each side of the creek, you go down that bank and up the other side of the bank; I should not think a person would call that a ridge, it has a top bank, same as a river or creek or anything.

Q. Were there many of those? A. Many creeks?

Q. Yes.

A. No, sir, just Toejam Creek. Toejam Creek has two banks, one on either side.

The COURT.—That is all.

Mr. LEWERS.—(Q.) Now, you may proceed and describe that fence, first as to what it was constructed of. A. Wire.

Q. What kind of wire, tell all about it.

(Testimony of R. E. Tilden.)

A. It is an old wire, it appears to be 15 or 20 years old, old-fashioned wire, and having 4 barbs; what I mean by four barbs, instead of having *to* points, have four points, which is an old-fashioned wire; very seldom see that wire now; the wire was rusted, very rusted. Some places 4 wires, some places 3 wires; some places in the fence the wire had been cut, and I particularly examined those cuts, and called the attention of the rodman [474] who was with me to examine them.

Q. Will you explain or describe what those cuts were like?

A. They were sharp distinct cuts, showed they had been cut with wire pliers, the end of the cut was rusty, covered with rust, which showed they had been cut a good many years.

Q. What was the general condition of the posts that you observed?

A. The posts were old, appeared to be redwood posts; redwood in that country lasts a great many years; the majority of the posts were standing, and in a great many places where the fence was down the posts were lying down, having rotted off.

Q. What was the general condition of the fence?

A. The fence was in a very dilapidated condition, would pass cattle countless places. I added up the openings from the beginning of this fence shown on exhibit "A" by end of fence.

Q. North end of fence?

A. Yes, sir, going in a southerly direction, westerly direction and southwesterly direction, at the

(Testimony of R. E. Tilden.)

junction of Rock Creek and Toejam Creek—I will have to refer to my book—2,790 feet of space not openings, numbered, but space, adding them all up would make a space of 2,790 feet, and I don't think I got them all then.

Q. Have you indicated any of those openings on exhibit "A"?' A. I have a few.

Q. I call your attention to what you have marked as end of fence toward the north, will you, beginning there, describe the openings which you have indicated on the plat?

A. Beginning at the end of the fence, which is the northern portion of that map, and travelling in a southwesterly direction, first come to an opening 60 feet wide; thence continuing in the same direction, where I saw a road, a very distinct road, well marked, but a very old road, the gate was lying on the ground, and there was an opening of 120 feet. Continuing on in the same [475] direction to the angle of these two fences on Toejam Creek, I found no gate, the gate was down, and there was an opening of 120 feet, or more; then continuing on around this fence, which is on the south side of the creek, there were several openings, but I have not them here.

Q. What is on there?

A. In a southwesterly direction on around to an opening which is north of the ravine, west of Opening No. 5, I found an opening of 302 feet; the fence was down completely, the wires were pulled back, some of the wires were out in the bushes, I particularly took notice of this, how they ever got there I

(Testimony of R. E. Tilden.)

don't know, but they had evidently been there a good many years, in the creek, showed that the water had evidently washed then down there.

Mr. PLATT.—There is a good deal of voluntary testimony here. I have not objected, but I think the witness ought to be cautioned about giving his opinion.

A. Thence in a southerly direction, we came to a ravine that had a gate, the gate was down, and an opening of 503 feet; going up a slight rise, which is the left top bank of Toejam Creek, passing the angle, we came to an opening of 312 feet, the same opening that the automobile party rode through; thence continuing in a westerly direction—can I say a little more about that fence?

Mr. LEWERS.—Yes, describe that.

A. This opening which is 312 feet wide, and as stated by other witnesses, this fence was lying flat on the ground, the post and the wire was covered with snow; continuing further, there was another opening of a similar character, 195 feet; and another one a little further on perhaps 600 feet further, of 90 feet; thence we came to an angle in the fence going in a northwesterly direction, I suppose about [476] 300 feet further, 90 feet wide; this is the opening that the automobile party crossed the fence again. Thence I went in a northwesterly direction, and before reaching the junction of Noble's or North's fence with that of the Golconda Cattle Company, I saw an opening 120 feet wide; also an old gate which is in at the junction of Noble's or North's fence and

(Testimony of R. E. Tilden.)

Golconda Cattle Company fence. The Golconda Cattle Company fence—

Q. Well, I have just asked you about the Noble fence this time. Now, Mr. Tilden, what lies to the north of that Noble fence?

A. The bank of the creek is the first thing you have to go up, and then a gentle rolling country, interspersed with ravines and gullies, and such as that.

Q. Rolling in what direction?

A. In a southwesterly direction.

Q. But as you go toward the north directly, say from station 37 up beyond Toejam Creek, what is the character of the country, directly to the north, northeast and to the northwest?

A. The country as far as I saw was very barren; there was no rocks on it, smooth, but sloping in a southwesterly direction; I especially noticed it being barren, that particular part.

Q. Now, you have described the country as rolling; what caused that appearance of rolling, Mr. Tilden?

Mr. PLATT.—If you know.

Mr. LEWERS.—Oh, I am assuming that he is testifying to what he knows.

A. You mean the general country between the creeks?

Q. Yes, at any place there you have described it as rolling, what caused that appearance?

A. The general view of the country, up and down, undulating.

Q. What is the down part?

A. It is a descending down to [477] small val-

(Testimony of R. E. Tilden.)

leys, and up to the next little ridge, and down to the next little valley, and up to the next little ridge.

Q. And that is what you say caused the rolling appearance?

A. Rolling appearance, the physical features of the country.

Q. And what are the angles of the down, generally—well, I withdraw that question, because I admit it is rather vague. I don't suppose any two of them have the same angle?

A. I can give you some of the angles if you wish them.

Q. Well, if you have any actual angles, that is what I want. A. Up to what point?

Q. Taking this country to the northeast of station 37, what I want to get at is how sharp these ridges and these ravines are, if you know?

A. As I said before, I could not say around up here, I never traversed the country, 36 to 37, 37 to 38, 38 to 39, we ran up the creek until we got on the top bank of Toejam.

Q. Will you take a piece of chalk and on this part of the board over here indicate what you mean by rolling country, as to the surface line?

A. What part, in a southwesterly direction?

Q. This general country up through that Opening No. 5.

Mr. PLATT.—I don't see how we are going to get chalk marks on a blackboard into the record.

The COURT.—You can have it put on the map later, if you wish it done. There will be no trouble

(Testimony of R. E. Tilden.)

about reproducing that on exhibit "A."

(Witness illustrates on blackboard.)

Mr. LEWERS.—(Q.) What is the relative difference between the valley and the peak there, generally? A. In what part of the country?

Q. Right in around station 37.

A. Well, there would be a slope of 2 degrees 40 minutes; suppose this was 36, suppose this was 37, that slope would mean 2 degrees 40 minutes. [478]

Q. And you have represented about 45 degrees there, haven't you, actually?

A. Yes, that is probably a little exaggerated.

Q. What I want to get at is, not an exaggerated representation but as near as you can, an approximately close representation.

A. Well, the apparent line in here.

Q. Through Opening No. 5.

A. I will draw you a general profile through Opening No. 5.

Q. If you draw that to a scale we can have that prepared. A. I can prepare it for you.

Q. Well, you may do that later. Have you any tractor, or any means of determining your angles?

A. Not here.

Q. Well, leave that until you can prepare that from your actual measurements. Now, coming back down to Opening No. 6, will you describe the country surrounding that, as to the surface of the ground, and its general conditions, its shape?

A. Low, rounding hills, covered with sagebrush, and little ravines running into Willow Creek from

(Testimony of R. E. Tilden.)

both east and west sides.

Q. Now, going up to Opening No. A, 300 foot opening, marked on both plats, what is the character of the ground there; what is there, tell all about what is in that vicinity.

A. There is a grove of trees near the corner of what is called Nelson's fence.

Q. How far from the opening is that grove?

A. Seventy-five feet, I guess. In this grove of trees there is a spring, I would naturally suppose the grove of trees had been there, stumps on the ground 250 or 200 feet along there, and to the southeast of this grove of trees, across this creek—

Q. Which creek is that?

A. Across the middle fork of Siawappe Creek, to the southeast of this grove of trees, across Siawappe Creek, the ground is quite barren, showed it had either been [479] travelled by cattle or sheep climbing the hill there quite often.

Q. What is the grade down through that opening to the creek?

A. Giving it the extreme limits, 12 per cent.

Q. That is from what point to what point?

A. To point about midway of the opening to the bottom of the creek.

Q. And how far is it down to the creek?

A. It is from the point where I was located, which is midway of the opening, 735 feet, or from the right top bank to the bottom of the creek was 735 feet.

Q. And what is the character of the bank of that creek down there, so far as you observed it?

(Testimony of R. E. Tilden.)

A. It has an easy slope on a 12 per cent grade, and showed that cattle or sheep or something had been going up there; it was all barren at that one point on the south side of the fence.

Mr. PLATT.—I move the latter part of the answer be stricken out, on the ground it is a conclusion of the witness, if the Court please.

The COURT.—I will allow that to stand. You may have an exception.

A. They will naturally go up there and—

Mr. LEWERS.—Never mind, the question has been answered. Where is that opening with reference to the position of the spring, and of the creek?

A. The opening is midway between the spring and the creek, maybe it is nearer the spring than it is to the creek.

Q. Now, did you from the point where that grove of trees is situated at any time observe the character of the country lying to the east and northeast?

A. I did.

Q. On what occasions did you do that?

A. In November, 1911, latter portion of November, and about 8 or [480] 10 days ago, latter portion of February, 1912.

Q. Now you say that clump of trees is near the opening? A. Yes, sir.

Q. Will you indicate by some appropriate mark on there just where that clump of trees is? (Witness indicates on Exhibit "A.")

Q. Now, looking from there toward the east and northeast, what was the character of the country?

(Testimony of R. E. Tilden.)

A. Looking to the east you would look up a long valley which follows on the south side of Nelson's fence, you can also see a summit, where this fence goes over, which seems to be an even slope all the way to the creek from where the summit is; I would think that summit would be a mile away anyway from where the grove of trees is.

Q. Toward the northeast what did you observe?

A. The northeast I observed a kind of a rugged country interspersed with ravines, gullies and ridges.

Q. Well, what was the surface, with reference to anything passing over it?

A. Well, you could get over it all right on horseback.

Mr. PLATT.—The same objection to all this line of testimony.

The COURT.—It will be the same ruling and same exception.

Mr. LEWERS.—(Q.) Now, Mr. Tilden, I call your attention again to Exhibit "A" as compared with Exhibit No. 1, and particularly to the creek marked the "North Fork"; is Exhibit "A" a correct tracing as to what appears on Exhibit 1 in that respect? A. No, sir.

Q. What is omitted?

A. I left off what he calls steep ground.

Q. Would you take a pencil and on Exhibit "A" lightly trace in there the position of that, so that the two may generally correspond. (Witness indicates on Exhibit "A.")

Q. Did you see that or any portion of that terri-

(Testimony of R. E. Tilden.)

tory? A. No, sir. [481]

Q. I mean not with reference to the bank, but did you see any portion of that territory where that bank is represented to be on Exhibit 1; did you see that country?

A. Yes, sir, I could see it, a general view of it; I passed all along this fence line there from beginning to end of it, and I probably was in the neighborhood of where this pointer is along there.

Q. Where is that?

A. That is in the west half of section 4, township 39 north, range 49 east.

Q. Now, did you look across that Nelson fence toward the east and southeast when you were up there?

A. I did.

Q. Could you see the creek? A. No, sir.

Q. Could you see any of the banks of the creek?

A. No, sir.

Q. Why not?

A. There was ridges running out toward that way, ridges, like the creek ran out this way and ridges running in to it, ridges and valleys both.

Q. What do you mean by valleys?

A. A valley is a low place between two hills.

Q. Running down to the creek?

A. Running down to the creek, numerous valleys; I never paid any attention to the creek.

Q. Now I call your attention on Exhibit No. 1 to this other alleged barrier situated in the southwest quarter of section 4, and ask you if you saw that?

(Testimony of R. E. Tilden.)

A. No, sir.

Q. Is it there? A. I never saw it.

Q. What is the character of that ground there?

A. It is the same as up here. I can depict that on the board a good deal better by drawing a sketch.

Q. I want you to describe it.

A. Well, from the Nelson's fence there are ravines and ridges running in an easterly and southeasterly direction, the valleys were of the ordinary kind, there was one valley, a very wide one, [482] and that valley is located on about the northwest quarter of section 4, township 39 north, range 49 east; I particularly took notice of that valley, it is very rounding at the bottom, and it sloped in an easterly and north-easterly direction.

Q. And what is beyond that valley, the first thing you hit right beyond it? A. Which way, easterly?

Q. Yes. A. I never went there.

Q. Well, could you see it? A. No, sir.

Q. Could you see the valley?

A. You mean the valley I was looking down?

Q. Yes. A. Oh, yes, I was in that valley.

Q. What I mean is, what was the east boundary of that valley?

A. I could not see it, didn't go that far; I just stopped along the fence line where the valley crossed, the valley just went about a quarter of a mile beyond the fence and stopped.

Q. What formed the sides of the valley?

A. Round ridges; this was a very round ridge, and on this side of the valley there was a very long slope.

(Testimony of R. E. Tilden.)

Q. This side, what side do you mean?

A. South side, there was a very long slope, and on the north side it was a high ridge, round, pretty good place for a baseball ground.

Q. What do you mean by that, describe what it was; the place that you say was good for a baseball ground. What was it like?

A. Like where station 36; the ground was covered with dry grass at least a foot high, a foot to 18 inches high, the stems of dry grass were there; and it sloped in a westerly direction, an even slope, I suppose on a one per cent grade in a westerly direction; in a northerly direction it was about 4 per cent, I guess, maybe not quite that much, that is straight down, the ground, following the ground surface; and I never observed it very much further. [483]

Q. Now, what did you say is the width of Opening No. 6, as measured by you?

A. You wish me to give my exact measurements?

Q. Have you the width of that opening in your notes?

A. I have it in my mind, I have not it in my notes.

Q. What was it?

A. Four thousand one hundred feet.

Q. Opening No. 6 I am calling attention to.

A. Oh, 6; 3,400 feet.

Q. Calling your attention again to the point where we started with the elevations, at the lane below the reservoir, what is that lane, describe it?

A. It is a lane, a hundred feet average width all the way through, 4 wires along the posts, well built

(Testimony of R. E. Tilden.)

road made through it.

Q. What road?

A. Public road from Tuscarora to Golconda, or from Gold Circle, either one.

Mr. LEWERS.—That is all.

Cross-examination.

Mr. PLATT.—(Q.) Indicate if you will upon Government's Exhibit No. 1 the highest northeasterly point of your survey observation. A. Thirty-six.

Q. Will you point it out upon Government's Exhibit No. 1.

(Witness indicates.)

Q. Now, how do you indicate it, in order that it may be recorded?

A. Along right in here (pointing).

Q. How would you indicate it upon the plat?

A. How would I indicate it upon the plat?

Q. Yes. Is it a point at the extreme northeasterly end of the Nelson fence? A. No, sir.

Q. Well, where is it, that is where you seem to be pointing.

A. Well, the sketches are so different, you know, it is pretty [484] hard to—

Mr. LEWERS.—Well, indicate approximately.

(Witness indicates on map, Exhibit No. 1.)

A. That may be a little nearer, it is somewhere in that neighborhood; maybe it might be a little closer to this corner.

Mr. PLATT.—(Q.) Well, will it be fair to state that it is a point about in the northeasterly direction about three-quarters the distance along the Nelson

(Testimony of R. E. Tilden.)

fence, as you have indicated it there upon the plat, and a little to the west there?

Mr. DENMAN.—Object to the question, in the first place as leading, and in the second place, the distance is manifestly about—

Mr. PLATT.—Well, 9/10, if counsel likes it better.

Mr. DENMAN.—9/10 is better.

Mr. PLATT.—You said yes, didn't you?

WITNESS.—No, sir, I didn't answer it at all.

Q. At any rate it is at a point indicated on the plat as about a quarter of an inch below the township line into which North's fence extends?

A. I should think so, approximately.

Q. Is that approximately correct? A. Yes, sir.

Q. Now, that is the highest northeasterly point of your observation, is it?

A. As per those maps, it would be. I should not think it is the same as this map; it would not be according to Exhibit "A." That would be the highest portion (indicates).

Q. But relatively, upon Exhibit 1 that is the point, isn't it? A. Yes, sir.

Q. And as to township, section and range, it is located relatively correct, isn't it?

A. Approximately.

Q. Now is this country, Mr. Tilden, up in the northeast indicated in the blue, is that country just the same as to topography as the country indicated in the white upon the plat? [485] A. No, sir.

Q. What is the difference?

A. From a point near the middle of section 33 to

(Testimony of R. E. Tilden.)

the southwest corner of, or to the middle of 5, it is a much evener and more level country than this is in here.

Q. You mean to say that a certain section of this country represented in the blue is more even and regular than the country represented in the white within the so-called inclosure?

A. I would not say all the white, no, sir, a portion about midway of the white, very rough in there.

Q. You were here in the courtroom, weren't you, when Mr. Sheehan and Mr. Button testified on behalf of the defendant? A. Yes, sir.

Q. Did you hear them testify that this section up here in the northeast was a mountainous country, as compared with the country designated in the white upon the plat?

Mr. DENMAN.—I object to that, in the first place it calls for a comparison, and is not proper testimony, and second—

The COURT.—No, this witness should not criticize the testimony of other witnesses.

Mr. DENMAN.—And in the second place, it does not fairly describe what the testimony was. The testimony was that the country lying to the northeast from where they stood was rougher as a whole than the country lying to the southwest, but as to where they actually stood, there was no such testimony.

Mr. PLATT.—I will refer to the record as to what the testimony actually was, if it becomes necessary.

WITNESS.—You see I am giving definite points, to the middle of section 33 and the middle of 5.

(Testimony of R. E. Tilden.)

Q. Now, what is the general condition of this country represented in the blue upon the plat in the northeastern section of the plat [486] to which I have just pointed, as compared with the general condition or topography of the country shown in the white within the inclosure?

A. It is a better country to travel over than the general country.

Q. You say it is a better country to travel over?

A. For at least three-quarters of a mile or mile, take it for a mile.

Q. Can you estimate just about how many miles of country there are in that northeasterly section as represented in the blue there?

A. Well, this portion here, you have an opening No. 5, $1\frac{1}{4}$ miles; that $1\frac{1}{4}$ miles to travel from east to west, or from west to east, would be a very nice country to travel in.

Q. You understood my question, didn't you, Mr. Tilden? I asked you if you could estimate about how many miles of country were represented in the blue upon the plat in the extreme northeasterly section of that plat?

A. I think about one square mile.

Q. One square mile? A. Maybe a little more.

Q. Are there any mountains or hills up in that section of country? A. Not between the fences.

Q. Did you understand that question? I asked you whether there are any mountains or hills within that section of country represented in the blue in the northeasterly extremity of that plat?

(Testimony of R. E. Tilden.)

Mr. DENMAN.—I object to that question, because it does not definitely set forth what the northeasterly extremity is; that may run from way down below on the creek, or close up there. If Mr. Platt will indicate by numbers, which will be very easy to do, what particular sections he is referring to, that will prevent any ambiguity. I object to the question on that ground.

The COURT.—You may answer the question.

A. There is a hill in the west half of section 34, which is the [487] west end of the hill; this point is from station 37, whatever it was, 5,000 and some feet distance; I can give you it exactly again if you want.

Q. Now, is that the only hill in that section of the country?

A. No, sir, there is a small rocky knoll or outcrop between 37 and 38, station 37, surveyor's station 37, and surveyor's station 38.

Q. State whether or not you would call that section of country I have indicated a mountainous or hilly country.

A. I would not call it mountainous; hills may be all the way from 15 feet high to 1,000 feet high; mountains are much larger.

Q. Are there any hills 1,000 feet high in that section?

A. One thousand feet above what, surrounding country?

Q. Well, you are answering the question, and I am asking you a question based upon your answer. You

(Testimony of R. E. Tilden.)

say hills may be all the way from 15 to 1,000 feet high; now, I ask you whether there are any hills in that country 1,000 feet high? A. No, sir.

Q. What is the highest one?

A. Eight hundred and forty-nine feet.

Q. It comes within 150 feet of being 1,000.

A. The lowest portion in here (indicating on plat).

Q. Now, as a matter of fact, Mr. Tilden, the tendency of this country, beginning from the southwesterly section of this plat and running in a northeasterly direction up to the extreme northeasterly point or corner of that plat, is toward an elevation higher toward the northeast, is it not?

A. Yes, sir.

Q. And is it not a fact when you get up into what is depicted upon that plat as the Toejam Mountain, in that section of country, that you find much more hilly country up there than you find down here in the southwesterly portion? A. Yes, sir.

Q. And is it not a fact you find much more hilly country up there than you find in that middle portion of the plat represented in [488] the white?

A. I should not think so, no, sir; about the same country through here, and up the south bank of Toejam Creek as far as I went, about the same as this, maybe the gullies are a little deeper.

Q. You say maybe the gullies are a little deeper in the northeasterly section than they are in the middle of that plat; is that the only distinction you make?

A. I should think so.

Q. Well, I want your honest opinion about it.

(Testimony of R. E. Tilden.)

A. Yes, sir.

Q. Based upon the fact as you saw it. Will you testify that the section of country in the north-easterly extremity of that plat is not more precipitous as to ravines and gullies and hillsides than it is in the center?

A. I have not been in the center to any extent; all I could do was to see over there; I could see from this place up this way, and I have been around in this country here (indicates), and I could see up through there, but right in the middle I have never been.

Q. Then you cannot testify positively, can you, as to the relative difference in topography between that northeasterly section of that plat and the center part of it? A. I cannot.

Q. Now, were you in a position so that you could see the so-called barrier represented upon Government's Exhibit No. 1, in sections 4 and 3 of township 40 north, range 49 east?

Mr. LEWERS.—To which we object on the ground that is not labeled barrier at all, that is pointing to what is marked "bank."

Mr. PLATT.—Well, I call it a barrier; it is indicated as very steep upon the plat, if the Court please; the witness knows what I mean.

A. I could see in that direction, but I was not in a position to examine closely.

Q. Well, you would not state positively from your point of observation [489] that that country was not very steep there, would you?

A. No, sir, only by the ravines that I saw going

(Testimony of R. E. Tilden.)

into there, and the general run of a ravine is not to jump right square off.

Q. But you were not at a point of observation so that you could testify positively whether the country was very steep there or not, were you?

A. I never was over that far.

Q. Now, you have sketched in here in green pencil, outside of the subject matter of the plat itself, what purports to be a representation of a mountain or hill, or mountainous country; I wish you would state what that is.

A. It is a long ridge; as I have stated, the west end is about 849 feet high above station 37, from this hill are gullies running down to Toejam, and I suppose running down to the creek on the south side.

Q. Now, as compared with such portion of the country as you saw, represented upon the plat in the white within the so-called inclosure, what kind of a country would you call that? I am asking as to the general condition of the country, whether mountainous, hilly, flat, or rolling, as compared with the section of the country represented in the white within the inclosure.

A. As I stated previously, all I could see was the west end of this hill; from there I went over to Toejam Creek, and ran the lines up to a point just north of the west end. I also was on the left top bank of this creek, and I observed up toward the mountain, further than that I did not go, any further than here.

Q. You use the term you "observed up toward the mountain," now what mountain, where was it?

(Testimony of R. E. Tilden.)

A. This point marked up and across a hill, the west half of section 34.

Q. Now, there is no question about a mountain being there, is there?

A. I would not call it a mountain, because I call it a hill. [490]

Q. You say you observed a point up toward the mountain, when you said mountain, didn't you mean it?

A. I mean hill, because mountains are from 1,500 feet high.

Q. How high was this hill or mountain, which you say now is a hill?

A. From above station 37 it is 800 odd feet high, 840 or something; 849 above station 37.

Q. Now, you made that observation of this hill or mountain from some little distance, didn't you?

A. I did.

Q. You didn't go very close up into that country, did you?

A. Five thousand four hundred feet, I think.

Q. From it?

A. Five thousand four hundred feet from station 37.

Q. That is a little over a mile, isn't it?

A. Yes, sir.

Q. So that you cannot testify as to any accurate observation made right in the country itself, can you?

A. You mean on top of the hill?

Q. Yes. A. Calculation, trigonometry.

Q. But you say you were a mile off when you ob-

(Testimony of R. E. Tilden.)

served this hill, or mountain, didn't you?

A. Yes, sir, the top of it.

Q. Therefore you cannot testify from an observation taken in the hill or mountain itself, can you?

A. Generally don't go on top.

Q. I don't care what you do generally.

A. I can testify I was in the vicinity; I was in that vicinity.

Q. You do testify you were a mile away from it, don't you?

A. Over a mile from the top; I was at the toe of the slope, station 37 is very near the toe of the slope.

Q. And you have correctly indicated on this plat, or with approximate correctness, just how close you were, haven't you? A. Yes, sir.

Mr. DENMAN.—Which plat do you refer to?

Mr. PLATT.—Government's Exhibit No. 1. [491]

Q. When did you begin to make your survey or observations in that section?

A. In the vicinity of that mountain?

Q. Yes. A. Tuesday, November 23d, 1911.

Q. Now, when did you begin to make your surveys for the purpose of submitting a report in this case, and testifying as a witness?

A. I didn't quite understand that.

Q. When did you first begin to make any surveys of any part of that country represented upon the plat known as Government's Exhibit No. 1?

A. The question has been answered, November 23d, 1911.

Q. Now, were you ever up in that country before that time?

(Testimony of R. E. Tilden.)

A. You mean where Opening No. 5 is?

Q. No, I mean the whole country as shown upon the plat? A. Yes, sir.

Q. When were you up there before?

A. The first time, the latter portion of October, 1910.

Q. What did you go for?

A. To make a survey of Squaw Valley.

Q. With a view of testifying in this case?

A. No, sir.

Q. Did you observe at that time any of the fence represented upon Government's Exhibit No. 1?

A. I did.

Q. Did you go for the purpose of making an accurate observation of the fence?

A. Of the opening?

Q. Of the fence or the openings.

A. Of the fence, I did; I never knew anything about openings.

Q. Didn't know anything about openings?

A. I took the majority of them, but I never knew I had to take them.

Q. Just state what you went for.

A. To make a complete topographic survey of the entire Squaw Valley, constituting the lowlands from the mouth of Toejam Creek and Rock Creek, and from the dam down to the mouth of the canyon.

[492]

Q. Then it was an observation as to the general nature of that country, regardless of fences or anything else?

(Testimony of R. E. Tilden.)

A. Yes, sir. Well, not regardless of fences, I had to take fences which included the topographic map.

Q. But you didn't go there and make your survey for that express purpose, of ascertaining as to when a fence was built, or how many openings there were in the fence, or anything of that sort? A. No, sir.

Q. Now, as a matter of fact, Mr. Tilden, the first time that you went upon this ground for the purpose of testifying in this case, or of giving information to the defendant in this case, or to defendant's counsel, was when you first made your visit, November 23d, 1911, was it not? A. Yes, sir.

Q. Now, so far as the gaps in the fence, or the general condition of the fence itself, you know nothing from any information derived prior to November 23d, 1911, do you?

A. Only what I observed on the ground.

Q. And you just testified a few moments ago that you were not looking for gaps upon any of your visits prior to November 23d, 1911? A. No, sir.

Q. Is that correct?

A. Well, not looking for any by any special order. I observed all the gaps pretty near, especially some very large ones.

Q. You say you observed all the gaps pretty near.

A. I was not told to get them.

Q. Well, you say you observed them all pretty near; did you observe them all?

A. As many as I obtained; a person might skip some of them.

Q. You could not testify positively now, could you,

(Testimony of R. E. Tilden.)

as to the exact number of gaps that you observed upon any of your previous visits?

A. The exact number, no, sir. [493]

Q. Your recollection upon that would be somewhat hazy, would it not?

A. Not the majority of them; I can give you the majority of them.

Q. Let me ask you, Mr. Tilden, when did you first discover that the North fence was down?

A. That is the Noble fence?

Q. Well, it is shown upon the plat as North's fence.

A. November, 1911.

Q. You did not make that discovery before, did you? A. No, sir.

Q. Now, you are sure that you didn't notice the North fence down before November 23d, 1911?

A. No, sir.

Q. There is no doubt about that, is there?

A. I never was up there before.

Q. You were never there before?

A. No, sir. I answered that question yesterday, or Saturday.

Q. Well, I am very glad to have you answer it again to-day. Now, you don't know when North's fence fell down, do you? A. Do not.

Q. You don't know whether it tumbled down during the winter of 1911, do you? A. Do not.

Q. And you don't know whether it was pulled down before you went up there, do you, as a matter of accurate knowledge?

A. Do not. I would judge it had been pulled down

(Testimony of R. E. Tilden.)

from the looks of the wires and the cut.

Q. Oh, that is your best judgment, that the fence had been pulled down?

A. The wires had been cut and pulled around, so cattle and sheepmen could go through, using my experience by—

Q. Do you know—

Mr. DENMAN.—Let him finish the answer. Finish your answer.

A. (Contg.) Judging from my experience, the ends of the wires [494] were rusty and showed it had been cut quite a number of years, and I could see no splice in it.

Q. Now, do you know, Mr. Tilden, whether cattle or sheepmen in trying to go through that fence, cut it, or whether the Golconda Cattle Company cut it?

A. I would not say the Golconda Cattle Company cut it, because I think it is probable, but from the looks of the rusted wire—

Q. Do you know whether Mr. North cut it or not?

A. No, sir.

Q. Do you know whether it was cut by cattle or sheepmen that wanted to get in there and could not, and found the fence in the way, and therefore cut it?

A. I should think not.

Q. You don't know that, do you? A. No.

Q. Now, what part of that fence was cut?

A. The part above Toejam, through section 28 and 27, township 40 north, range 49 east, and section 32, township 40 north, range 49 east.

The COURT.—Does this question refer to the

(Testimony of R. E. Tilden.)

places where you found the wire cut, or more places where there were gaps?

Mr. PLATT.—Just where they were cut.

WITNESS.—Might have seen a great many more, but I never examined all of them.

Q. But you testify the fences were cut in the places you have just enumerated? A. Yes, sir.

Q. Have you had any experience, Mr. Tilden, as to the custom of ranch owners about cutting their own fences?

Mr. LEWERS.—If the Court please, I object on the ground the question is vague and indefinite, and there is no testimony there is any established custom about cutting fences.

Mr. PLATT.—We have had a lot of opinion testimony here, if the Court please, to which I have objected, and which the Court [495] in the exercise of its discretion has permitted.

The COURT.—Now, you want to go into the question as to whether there is a custom about cutting fences?

Mr. PLATT.—Yes, your Honor.

(Discussion by counsel.)

The COURT.—I will allow this question, and I think the answer of the witness will probably eliminate the whole matter: Do you know what the custom of cutting fences is in this country here, by sheepmen and cattlemen?

A. Do not.

Mr. PLATT.—(Q.) Well, as a matter of fact, Mr. Tilden, you testified as an expert engineer and sur-

(Testimony of R. E. Tilden.)

veyor, didn't you?

A. Yes.

Q. You have not had any experience as a cattleman or ranch man, have you? A. I have.

Q. Oh, you have? A. Yes, sir.

Q. How much experience have you had as a cattleman?

A. I was born on a Louisiana plantation, and lived there 18 years, drove sheep, plowed cotton and corn, and cultivated and raised crops, and understand farming perfectly.

Q. You don't know anything about the custom of ranchers cutting their own fences?

A. Do not; have gates down in that country and have plank for timbers, plentiful, and put wires on top.

Q. Then you have not any familiarity with the custom about cutting fences or putting up gates in fences?

A. Not in this country; we put up gates where we have to go through them, along through the fence.

Q. And the only experience you have had is down in Louisiana, is that true?

A. I have lived in Nevada since March 14, 1904.

Q. What experience have you had as a cattle and ranch man in Nevada?

A. Surveying ranches, engineer for irrigating [496] companies, one of my surveys is Twin Fall Canal, Idaho.

Q. As a matter of fact, you at these times were engaged in the expert work of surveying, and not in ranching?

(Testimony of R. E. Tilden.)

A. No, not in ranching, I have been all over ranches.

Q. Do you know how many feet above sea level the Dutton Ranch house is?

A. I really don't know; I understand it is about 5,000, or more than 5,000, I am not certain about that; I would not want to go on authority as to that: I don't know.

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

R. E. TILDEN, cross-examination continued.

Mr. PLATT.—(Q.) Do you know how long North's fence is?

A. Well, I could scale it off of the map very closely, I can't tell you off-hand.

Q. I wish you would tell to the best of your ability.

A. Now, from what point?

Q. Well, from a point indicated upon Government's Exhibit No. 1, beginning at the left extremity.

A. Oh, I see, I understand. About 2 9/10 miles, not quite 3, might call it 3.

Q. About 3 miles? A. About 3 miles.

The COURT.—(Q.) Is that the total length?

A. No, sir, that is just shown on exhibit 1; from the junction of what is called Golconda Cattle Company fence on northeasterly.

Mr. PLATT.—That is all. [497]

Redirect Examination.

Mr. LEWERS.—(Q) Mr. Tilden, does Exhibit No. 1 show the total length of North's or Noble's fence? A. No, sir.

(Testimony of R. E. Tilden.)

Q. Does Exhibit "A" show any more of it?

A. It does.

Q. Does Exhibit "A" show the extreme extent to the north of what is known as the North fence or Noble fence? A. It does, the north end of it.

Q. Now, what was the highest, I mean in elevation, station that was established by you in your survey?

Mr. PLATT.—I object, if the Court please, upon the ground it is improper cross-examination, and was brought out in the direct.

Mr. LEWERS.—No, there were some questions in cross-examination that produced a certain amount of confusion in my mind, at least, whether it meant highest in distance or highest in altitude, that is what I want to get at.

The COURT.—Very well.

A. The end of Noble's fence, I have not got it worked out, but it is considerably higher.

Q. What is the number of the station, I want to get at?

A. Oh, the number of the station? I have not the elevation worked out. Station 48-B, end of Noble's fence line.

Q. That is the end of Noble's fence line as shown on Exhibit "A"?

A. Yes, sir, I can put it on there.

Q. I wish you would mark it.

(Witness indicates point on Exhibit "A.")

Q. And what is the relative height of stations 36 and 37 in elevation?

A. Thirty-seven is 122 feet lower than 36.

(Testimony of R. E. Tilden.)

Q. Now, you have stated in cross-examination that the hill represented in section 34, was 849 feet higher, I believe you said, than some station down below, what station was it? [498] A. Station 37.

Q. Now, how much higher is the top of that hill than station 36?

A. Well, it is 849 feet less 122, 727 feet, above station 36.

Q. Now, to get at the same thing in another way, taking a cross-section by your stations generally across Opening No. 5, which is the lowest point on that cross-section? A. By the station line?

Q. Yes. A. Station 37.

Q. Then your height of 849 feet was from the lowest point in Opening No. 5 to—

A. (Intg.) On the survey line.

Q. On the survey line, to the top of that hill, was it? A. Yes, sir.

Q. And what was the farthest point north that you went on that survey?

A. Station 48-B, as shown on Exhibit "A."

Q. And that is what?

A. The end of fence, the end of Noble's or North's fence.

Q. And where do you say station 46 is?

A. Forty-six is at the junction of a ravine running through the east half of section 38 on Toejam Creek.

Q. With reference to this hill you have represented on section 34, where is station 36, what direction?

A. It is slightly northwest, almost due north you

(Testimony of R. E. Tilden.)

might say, 5 degrees northwest.

Q. Now, calling your attention to the places that you were asked concerning the cutting of wires in cross-examination, how many places were there that you observed the wire cut; I want to get that definitely?

A. I only examined two places; one was about, from the scale it looks like maybe 300 feet south of the end of—

Q. Which end?

A. The north end of Noble's fence, marked "End of fence" on Exhibit "A." [499]

Q. Where is the other?

A. The next place was about three-quarters of a mile west of station 37, as shown on the map in section 32.

Q. Now, calling your attention to the long gaps you have testified to in places where the fence was down, one I believe you testified was 312 feet; was that correct? A. The fence was down, yes, sir.

Q. What was the condition of the fence there, as to whether it had been cut or not?

A. It had not been cut; the wires and posts had both fallen, lying on the ground.

Q. What was the condition of the posts?

A. Old, dilapidated, rotted off.

Q. And at other places along the fence what was the condition of the posts and wires?

A. Some places the wires were down on the ground and posts standing; other places the posts were rotted off, standing in the fence; other places down

(Testimony of R. E. Tilden.)

altogether; sometimes there was a middle post down.

Q. At these two places you examined, where you said the wires were cut, state again what was the appearance of the ends of those wires, where they were cut?

A. Rusty; very very rusty; showed that they had been exposed to the weather for quite a long time.

Mr. LEWERS.—That is all.

Recross-examination.

Mr. PLATT.—(Q.) Now, Mr. Tilden, will you give us the entire length of the North fence as you have shown it upon your plat?

Mr. LEWERS.—You mean starting from the same point?

Mr. PLATT.—Starting from the same point.

A. I can only give it to you approximately, scaling off. [500]

(Witness measures on map.)

A. Five miles from the junction of the Golconda Cattle Company fence to the end of the fence marked 48-B on Exhibit "A."

Q. That is approximate, you say about 5 miles?

A. About 5 miles, roughly.

Q. Now, is it your understanding that North's fence and Noble's fence are two different fences, or are those two names applicable to one line of fence?

A. Same fence.

Q. Same thing; so when you say North's fence, it might mean Noble's fence, or when you say Noble's fence it might mean North's fence?

A. Same thing.

(Testimony of R. E. Tilden.)

Q. In other words, there are two names for the same fence, is that right?

A. Identical, although I never heard the name of North fence until I came here.

Q. But that is your understanding, is it not?

A. Yes.

Q. And it is upon that understanding you have identified both the plats? A. Yes, sir.

Mr. LEWERS.—We admit that is the fact, Mr. Platt.

Mr. PLATT.—(Q.) Did you go to the extreme northeasterly point of the North's fence as you have shown it upon your plat?

A. I went within 488 feet of the end of the fence line, my rodman went to the end of it; I could see the end of the fence from where I was.

Q. Now, is there any other line of fence meeting the so-called North fence, as you have shown it upon the plat, either at right angle, or any other angle?

A. Not that I know of.

Q. You say you were within 480 feet of it?

A. Four hundred and eighty-eight.

Q. And you didn't notice from that distance any fence? A. To the east or west?

Q. To the east or west, or easterly or westerly of it? A. No, sir, there wasn't any. [501]

Q. Well, is it reasonable to state that the north-easterly end of the North fence did not form one side of any sort of an inclosure? Do you understand what I mean by that?

A. Form one side?

(Testimony of R. E. Tilden.)

Q. Yes.

A. I would not think it did; I never saw any.

Q. You never saw any. In other words, roughly speaking, those dotted lines may represent the North fence? A. Yes, sir.

Q. Now, state whether or not after you went within 480-odd feet of this end line, whether you noticed any fences going in either one of those directions, and other fences going approximately in those directions, so that this line fence about which you testified formed one side of a field fence.

A. There were no other fences.

Q. Then my understanding is that in a southeasterly direction from the North line fence, and in a northwesterly or westerly direction from the North line fence, and continuing straight on from the north-easterly direction from the end of that North line fence, there were no other fences? A. Yes, sir.

Mr. LEWERS.—What do you mean by North line fence, do you mean North fence?

Mr. PLATT.—Just read the question.

(The reporter reads the question.)

Mr. PLATT.—I mean the North fence or Noble's fence, when I say North line fence.

A. I understood that.

Mr. PLATT.—That is all. [502]

[Testimony of E. J. De Lano, for the Defendant.]

E. J. DE LANO, called as a witness by the defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is E. J. De Lano? A. Yes, sir.

Q. Where do you live? A. Golconda.

Q. How long have you lived there?

A. Four years.

Q. What is your business or occupation?

A. Miner.

Q. Have you ever been in the Squaw Valley country? A. Yes.

Q. When were you there?

A. Last November.

Q. What were you doing while you were there?

A. I was assisting Mr. Tilden on a survey.

Q. What were you doing while assisting him, what function did you perform?

A. Why, I expect you would call it head rodman.

Q. Now, I call your attention, Mr. De Lano, to the two exhibits, No. 1 and "A," and particularly to the northeastern portion of these two exhibits, the territory between Toejam Creek on the north and Siawappe Creek on the south, and ask you if you are familiar with any portion of that territory?

A. Well, quite, yes.

Q. How did you gain that familiarity?

A. By carrying this rod over it.

Q. Now, if you will step down to the map a moment. I call your attention to a symbol on Exhibit

(Testimony of E. J. De Lano.)

“A,” in section 34, on the west side, marked with a cross and the word “Hill,” and ask you if you know what that is, and where it is on the ground?

A. Yes, I think I do.

Q. What is it?

A. Why, it is a rolling hill in there, I don't know what else. [503]

Q. I also call your attention to a red fence line running up there, joining onto a black fence line below, marked “Nelson's fence,” and ask you if you know where that fence is on the ground? A. I do.

Q. Were you on any portion of that ground?

A. Yes, sir.

Q. I again call your attention to the portion marked “Nelson's fence,” and also to the part which is marked Opening No. A, with the word “Trees” there, do you remember that ground?

A. I do; yes.

Q. What is there, what is your recollection?

A. A bunch of quaking-asp there, and a spring.

Q. Now, going further north along the Nelson fence represented by red on the map Exhibit “A,” will you point out on that map where you went, if at all, at any point east of that Nelson's fence?

A. Well, I went to a point down in here, somewhere in here (indicating).

Q. Down in here indicating the southwest corner of section 34?

A. Right in that neighborhood somewhere.

Q. I call your attention to a creek on Exhibit “A,” marked “North Fork,” and ask you if you know where that is? A. I do; yes.

(Testimony of E. J. De Lano.)

Q. Did you see it at any time? A. Yes.

Q. When?

A. When I was out there on the survey.

Q. How close were you to that creek?

A. Well, I was right on the creek, I crossed it several times, I think.

Q. Now, I call your attention again to that creek, and ask you particularly with reference to the south bank of it, whether you observed the banks of that creek?

A. Well, yes, I can remember the banks of the creek well.

Q. Describe them.

A. Well, it is kind of a rolling sort of a country there, is all, raising on the outside into little peaks.

[504]

Q. But particularly with reference to the bank of the creek, right at the creek?

A. Oh, right at the creek?

Q. Yes.

A. There is a little valley there, not exactly a valley, but a little bottom in there.

Q. Well, how steep would you say those banks of the creek are?

A. Oh, they are 25 or 30 degrees, I guess, possibly not quite as steep as that; maybe about 20 or 25 degrees.

Q. Could cattle or anything else cross those creeks?

A. Oh, yes.

Mr. PLATT.—Same objection, if the Court please, to all this line of testimony, without repeating.

Same ruling and exception.

(Testimony of E. J. De Lano.)

A. Nothing to stop them that I saw; cattle can travel over that country anywhere.

Mr. LEWERS.—(Q.) Now, I call your attention to a dotted line running across what is known as Opening No. 5 on Exhibit “A,” and marked “Toejam Mountain” as shown on Exhibit No. 1, and ask you if you were on any portion of that territory where that is represented to be?

A. Right through there?

Q. Yes.

A. Well, I think I did cross right in here.

Q. That is indicating through the west side of section 33?

Q. Yes, right through there.

Q. How near were you to any other portion of that so-called barrier toward the southeast end?

A. Towards the southeast end?

Q. Yes. A. I wasn't any nearer than in here.

Q. In here indicating near the south line of section 34, and in the southwest quarter. Now, did you see that barrier?

A. I don't know as I understand what a barrier is.

Q. What did you see there in that ground I have pointed out, where this is represented to be on the map? [505]

A. Well, just natural rolling hills there, same as everywheres all over that country.

Q. I will ask you whether or not at the place where that is represented to be cattle could pass through?

A. Why, certainly.

Q. Could anything else? A. Yes.

(Testimony of E. J. De Lano.)

Q. What?

A. Oh, you could drive a wagon through there.

Q. Well, describe the ground as near as you can.

A. Well, I don't know as I can describe it in any other way than rolling hills, up and down, all manner of shapes.

Q. In acting as rodman where, if anywhere, did you go in the neighborhood of Toejam Creek?

A. Yes.

Q. Well, where did you go?

A. We came down on Toejam Creek, down to a point about here somewhere, I should judge, on the map somewhere in there (indicates).

Q. Indicating near the northwest corner of section 33. Now, what was the character of the ground or country in going over from Nelson's fence to that point on Toejam Creek?

A. Well, it was a very low place in that divide that comes down here, very low.

Q. What sort of surface, on the ground?

A. Well, it was slightly rolling.

Q. Now, did you at any time when you were carrying that rod over there, or when you were in there, observe the country to the east and northeast of this place near Toejam Creek, where you say you went with the rod?

A. Yes, a man would naturally look to see the country as he was going along.

Q. What was the appearance of that country looking towards the northeast?

A. Natural rolling hills, raising up gradually all

(Testimony of E. J. De Lano.)

the way up to the divide.

Q. Could cattle pass up through there?

A. Yes, sir. [506]

Q. Anything else?

A. Well, yes, I never saw any place—you could get a wagon through most anywhere.

Q. Now, Mr. De Lano, state whether or not anywhere on that survey you noticed any trails of any kind.

A. Oh, there is stock trails all over that country.

Q. Where?

A. All up through here and through here. Wherever we went on that survey, I noticed stock trails all around everywhere.

Q. Wherever you went with the survey?

A. Yes, sir.

Q. Did you go along any portion of what is known as the Noble fence? A. Yes, sir.

Q. And will you describe that fence, what you found, its condition, all about it?

A. Well, it is a very old fence, and in a very dilapidated condition, a great deal of it down.

Q. What kinds of wires and posts, and what was their condition?

A. Ordinary posts, there were wires rusted a great many places, and broken down on the ground, some places wound up and taken down the road, several places. I consider it is a very old fence in a dilapidated condition, that is all.

Q. Would it turn cattle?

A. Might be places in it it would.

(Testimony of E. J. De Lano.)

Q. But generally would it? A. No.

Q. And how far up on that fence did you go to the north? A. Went up to the end of it.

Q. Was there any fence there going off in any other direction? A. No.

Q. Did you see any cattle trails anywhere in that vicinity? A. Yes, even saw wagon tracks up there.

Q. Now, beyond the north end of that fence could cattle pass? A. Yes, sir.

Q. About how large a space was there in there for them to pass through?

A. Well, from there to the top of the hill, I [507] guess half a mile or more.

Mr. LEWERS.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Could not they pass through any further than that, just from there to the top of the hill?

A. From the end of the fence to the top of the hill?

Q. Yes. A. I don't understand you, sir.

Q. Could not they pass through any greater distance than that, from that point to the top of the hill?

A. I don't understand that question.

Q. Well, how high was the top of the hill from the point to which you have just testified?

A. The top of the hill? Oh, it was probably 700 or 800 feet, probably higher.

Q. Higher from the end of the fence?

A. The top of the main range we were travelling up on.

Q. You could see that, could you, pretty plainly?

(Testimony of E. J. De Lano.)

A. Oh, yes.

Q. How far away from it were you?

A. Half a mile away, I guess.

Q. You say it went up 1,000 feet in half a mile?

A. I expect there were points on it 1,000 feet.

Q. It is quite a steep hill, is it not?

A. Quite a steep hill, yes.

Q. Did it have little ridges and projections on it?

A. Yes, what you would naturally expect on a hill of that kind.

Q. Well, it would not be very easy for cattle to get over the top of that, would it? A. Oh, yes.

Q. No trouble at all? A. No trouble.

Q. How steep was it down on the other side?

A. I didn't go over the other side [508]

Q. You don't know then?

A. Don't know what the other side is at all.

Q. Did you go anywhere that Mr. Tilden didn't go?

A. Well, yes, I think I went some points he didn't go.

Q. How far away were you from him at any time?

A. Oh, I don't know as I could remember.

Q. Well, you were just holding the chain for him, weren't you? A. Yes, as far as he could see.

Q. You were always in sight of him, weren't you?

A. Yes.

Q. Well, as a matter of fact, this country where you saw that hill which you say is about 1,000 feet higher than the land at the end of the North fence, is a hilly country, is it not?

A. It is a hilly country, yes.

(Testimony of E. J. De Lano.)

Q. Well, it is hillier, is it not, than it is down here upon these rolling places? A. Oh, yes.

Q. Well, it is considerably hillier, is it not?

A. Well, yes, there is a mesa there, as you get to the top of the mountain it becomes rougher.

Q. Is there a mountain there too?

A. I consider them all mountains.

Q. Oh, you do, in that section of the country?

A. They are known as mountains through there, yes.

Q. Do you know what name they give them?

A. No.

Q. This section of country shown in blue upon this plat, I want you to examine it, so there will be no misapprehension about it; I mean this blue in the north-east extremity of Exhibit No. 1, where all these little lead pencil marks are, wouldn't you call that a mountainous country up there?

A. Oh, yes, that would be considered a mountainous country.

Q. There would not be any doubt about that, would there? A. No. [509]

Q. Well there is nothing down around that country shown in the white on Exhibit No. 1 which you just examined within the so-called fence lines, which is anything like the country up further, is there?

A. No, it ain't so rough, no.

Q. It is not so rough? A. No.

Q. Wouldn't you call it much rougher up in the northeastern part you pointed out than you would down upon the white part, shown upon the plat?

(Testimony of E. J. De Lano.)

A. Yes, sir.

Q. As I understand it, you would call the north-eastern section a mountainous country, and what would you call the white part as shown on the plat?

Mr. DENMAN.—He has not said that he called it a mountainous country yet.

Mr. PLATT.—I think the record will establish that.

WITNESS.—Well, in fact Squaw Valley is surrounded by mountains, it is a basin down in there.

Q. Oh, Squaw Valley is surrounded by mountains, is it? A. Yes.

Q. And is it surrounded in the northeast as well as any other place?

A. Well, of course my term of mountain and yours may be different.

Q. Now, you called them mountains, I didn't call them mountains. Do you want to retract your testimony, and correct it? You said they were mountains.

A. No, they are mountains, I stick to it.

Q. They are mountains, there is no question about it; and they are mountains up here in the blue which you came to the map and indicated yourself?

A. They are all mountains.

Q. You understand that, and there is no question about it, I just want the truth.

A. It is all a mountainous country. [510]

Q. Now, I will repeat the question which I just asked you. You say that this country up in the north-east is all a mountainous country; now, I ask you

(Testimony of E. J. De Lano.)

what kind of a country it is down here upon the lands shown in the white, between Rock and Willow Creek?

A. That might be considered a foothill country.

Q. That is a foothill country? A. Yes.

Q. Now, let me get you right: The part in the white upon the plat you consider a foothill country?

A. Well, it is pretty hard to describe, but I guess it would come in there under that pretty well.

Q. And the part up here in the northeast in the blue is a mountainous country?

A. Yes, a mountainous country.

Q. Now, you had never been in that section of country, had you, before November, 1911? A. No.

Q. That was your first trip in through there? Now, you did not follow any stock trails clear to the top of the mountain did you? A. No, sir.

Q. You don't know whether the stock trails began from the northeast or ended at the northeast, do you?

A. I could not know whether they went over the mountain, but it is plain enough to see that stock could range all over that country up to the top, plain enough to see that.

Q. How far within the top of the country did you go? A. Within a half a mile, I guess.

Q. And you examined the trails to that extent?

A. One naturally would crossing the country.

Q. Now, you don't know as a matter of fact, do you, whether it was possible for any cattle to come in from a northeasterly direction and go down into this country, do you?

A. I don't know whether they were on the other

(Testimony of E. J. De Lano.)

side of the mountain at all. [511]

Q. And you didn't see any trails, or anything like trails, which would indicate that cattle came from the northeast over the mountain?

A. I would naturally expect they did, because there was passes through there that you could get through.

Q. You understood my question, didn't you; I ask whether you saw any trails, or anything like trails, that would indicate that cattle came over the mountain?

A. There were trails there where they came, only I didn't follow them up to see.

Q. As a matter of fact, you saw trails along the slope, didn't you?

A. I didn't follow them up to see where they were, a man naturally crossed trails wherever he was going in that country, it was a stock country.

Q. These trails were on the mountain or hillsides that you saw?

A. Yes, naturally would be, because I was on the hillsides myself.

Q. I just want to know where you actually saw the trails, that is all. A. Yes, sir.

Q. Had you ever had any experience as a chainman before, Mr. De Lano? A. I had; yes, sir.

Mr. LEWERS.—He didn't say he was a chainman.

Mr. PLATT.—I may have used an inappropriate term there, but you were an assistant to the engineer?

A. I never carried what was called a stadia rod, that was my first experience with that.

Q. Now, this point to which your attention was

(Testimony of E. J. De Lano.)

called on the plat, Defendant's Exhibit "A," and it was pointed out to you as a barrier, and you replied that you didn't know whether it was a barrier or not?

A. Well, it has nothing there to—

Q. Just a moment, I am making this explanation so you will understand the point to which I am referring. This so-called barrier [512] is in section 3 and 4, township 40 north, range 49 east. Now, will you tell the Court just how close you were to that barrier. A. You mean that shading on there?

Q. Yes.

A. Oh, I was probably within 300 or 400 feet of it, I guess, 500 feet, somewhere like that.

Q. Well, there is no question but you were that close to it, is there? A. No, I don't think so.

Q. And what did you see there?

A. Well, just natural rolling hills, as you find on the side of a mountain. It is hard to come in here and describe a mountain, you know, because they are all kinds of shapes and forms and contour, and everything else.

Q. How much of a mountain was there?

A. Not very much of a mountain; they call it a mountain, that is about all.

Q. It was enough to be called a mountain, was it?

A. Yes.

Q. You would call it a mountain and not a hill?

A. Yes, I would call that a mountain range through there.

Q. You would call that kind of country, as I understand it, through there, a mountain range?

(Testimony of E. J. De Lano.)

A. Yes.

Q. Now, you never saw North's or Noble's fence did you before you made this trip? A. No.

Q. Of course you don't know when this fence blew down or fell down, or whether it was torn down, or how it came down? A. No, sir.

Mr. PLATT.—That is all.

Redirect Examination.

Mr. LEWERS.—(Q.) Taking this point near the corner of Nelson's fence as your base, did you see anything rising above that, high enough above it to call it a mountain?

A. I consider that was up on the mountain then.

Q. I will ask the question in another form: Assuming that was [513] level there, did anything rise high enough above it to be called a mountain in that territory? A. Not that I know of.

Q. What is the shape of that hill up beyond the north end of the Noble fence?

A. Well, that is pretty hard to describe.

Q. Well, generally?

A. Same as the other little ridge, ridge all over the mountain is about all, I could not describe it any other way.

Q. Could cattle pass over it?

A. Yes, sir, no question about it; if they was up to the top, as I said, but I don't know what it is on the other side.

Q. Now, you say that you saw trails running all over that country; did any of those trails that you saw run toward what is marked as a hill in section 34

(Testimony of E. J. De Lano.)

from the direction of any of the creeks?

A. Well, now, I could not swear to the course of any of those trails, all I know there is trails all over that country wherever we went, stock trails, but as to their course, I could not swear to that.

Q. What was the vegetation on that ground there?

A. Sagebrush, as far as I could see.

Q. Any bunch grass?

A. Occasionally a little grass, saw some.

Q. And you were there in what month?

A. November.

Q. Was there any snow on the ground at that time?

A. Very little on the north side of the hills.

Mr. LEWERS.—That is all. [514]

[Testimony of Harry Petrie, for the Defendant.]

HARRY PETRIE, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. Your name is Harry Petrie? A. Yes, sir.

Q. What is your present occupation?

A. Manager of the Golconda Cattle Company.

Q. Have you had any experience in the stock business? A. Yes, sir.

Q. How many years?

A. Oh, more or less for 25.

Q. How long have you been manager of the Golconda Cattle Company? A. Since July 1st, 1911.

Q. Have you ever been out into the country inclosed by Rock Creek, Toejam Creek, Willow Creek and Siawappe Creek? A. Yes, sir.

(Testimony of Harry Petrie.)

Q. When did you first go out there?

A. About the 18th or 20th of June, 1911.

Q. Where did you go at that time?

A. I went up Rock Creek and up Toejam, and down Siawappe, and down Willow Creek.

Q. Have you been there since?

A. I have.

Q. When were you there?

A. Sometime in October. Well, I was there in July, prior to that, about the 23d of July, and sometime in October, and again a couple of weeks ago.

Q. Were you on this party of four or five gentlemen, including Mr. Button, Mr. Lamb, Mr. Lewers, and others? A. I was.

Q. That went up there about two weeks ago?

A. Something like that.

Q. Now, coming along the Willow Creek country, you know where the dam is there, do you not?

A. Yes, sir; I do.

Q. Was there any opening in the side of the dam?

A. A wing. [515]

Q. What is that opening in, a fence there?

A. It is an opening in the fence.

Q. I call your attention to Exhibit No. 1 and Exhibit "A"; where, with reference to the lane shown on the map, was the opening to which you have just referred as being a lane.

A. There (indicating).

Q. That is at what is called Opening No. 7, of 100 feet? A. I judge it to be about 100 feet.

Q. Is that the opening you are referring to now?

(Testimony of Harry Petrie.)

A. That is the opening I am referring to.

Q. That is what you call a lane? A. Yes.

Q. How did you come along there?

A. Came along in a rig, a buggy.

Q. On the road?

A. On the Elko road, the Tuscarora road, rather.

Q. Did the road pass through the lane?

A. It did.

Q. Where did you go then?

A. Went on up along the road, on up Willow Creek.

Q. How far did you go up Willow Creek?

A. What time was this?

Q. Well, say when you went there in the spring of 1911.

A. Well, I was up there before I made the other trip, but only to a point about here, just above the dam.

Q. What point is that?

A. That is a half a mile opening in the fence along Willow Creek.

Q. That is opening called Opening No. 6 on the map here; is that what you pointed to?

A. This is the opening right here, yes, No. 6.

Q. When did you come there the next time?

A. The first trip up this far was in April, sometime, I don't remember the date. [516]

Q. What was that opening there then?

A. I could not say, I only went to about this point; I don't know at that time about that.

The COURT.—(Q.) Was that April, 1911?

(Testimony of Harry Petrie.)

A. April, 1911, yes, sir.

Q. When was the next time you went there?

A. That was about the middle of June, 18th or 20th of June; I went this other way through Rock Creek.

Q. Clear around back to that point?

A. Made a circuit of that country, Rock Creek, Toejam, Siawappe, and Willow Creek.

Q. Did you come to that opening on that trip?

A. Passed that opening, yes.

Q. Was it then you discovered the opening you described?

Mr. PLATT.—I object again to all these leading questions.

Mr. DENMAN.—(Q.) What did you see at that time at that opening as to the width?

A. It is about a half mile opening; I don't know definitely the width of it; I judge it to be about a half a mile.

The COURT.—(Q.) What opening does that refer to, No. 6?

A. No. 6, yes.

Mr. DENMAN.—(Q.) Now, following along this map towards the north from this opening to a place in section 8 of township 39 north, range 49 east, marked on the map "Opening No. A," did you reach that point on your trip in June? A. Yes, sir.

Q. What did you find there?

A. Found an opening there of approximately 300 feet.

Q. What can you say of the character of the

(Testimony of Harry Petrie.)

country there on each side of that opening, the natural objects and other things that you saw?

A. Well, there is a spring with a few cottonwoods just northwest of the opening, the creek lies just east of it; [517] the country is a rolled and broken country, very rocky.

Q. Where do those rocks lie?

A. They are scattered promiscuously over the ground.

Q. And any in the opening itself? A. A few.

Q. How large? A. Oh, the rocks vary in size.

Q. In the opening, I am speaking of now, at A?

A. They are small rocks, size of a cuspidor, or as small as a hen's egg, just a rocky surface.

Q. Did you, at that point, take a look to the north-easterly?

A. We stopped and ate our lunch there, and drove in there with a buggy; stopped there and ate our lunch and sized the country up generally.

Q. Did you look in a general northeasterly direction at that time?

A. Yes, I looked the country over generally when I drove in there, never been there before.

Q. Now, let me ask you as to your last trip that you made in there with these other gentlemen. Did you arrive there at that same point on this last trip?

A. I did.

Q. And did you, on that occasion, look in a general northeasterly direction from that opening?

A. We travelled northerly from there.

Q. Did you look across the country which is

(Testimony of Harry Petrie.)

marked on here by an object like a caterpillar, and running in a general northerly and southerly direction, in the southwest quarter of section 4, and the northwest quarter of section 9; did you look in that direction? A. Yes.

Q. What did you see in that direction?

A. I saw a country of rolling hills.

Q. Did you see anything that corresponded with that caterpillar-like object drawn on the map?

A. No, I did not. [518]

Q. What can you say as to the country, as far as its possibility or availability for the passage of stock in the direction of westerly from easterly, across where this caterpillar-like object I described lies?

Mr. PLATT.—Same objection, if the Court please, to this line of questioning, and I suppose the same ruling.

The COURT.—The same ruling, and same exception.

Mr. DENMAN.—(Q.) What did you see?

A. I saw a rolling country, as I have described, and some draws, some hills, some smooth, some more or less rough. The bulk of this country through here—

Q. Just a moment. I am confining my question to what you saw as you looked across this country you have described as having the caterpillar-like drawing; what would you *saw* as to that country with reference to the possibility of stock passing over it from the west to east?

A. No possible obstruction there, in my judgment.

(Testimony of Harry Petrie.)

Q. How far can you see in that direction?

A. Well, I don't know; you can see a long distance, several miles, perhaps.

Q. Now, continuing further north, where did you go to as you followed up Nelson's fence?

A. We went beyond the westerly end of the fence, and turned across through this country, westerly.

Q. Now, I will ask you when you got to the head of Nelson's fence, on exhibit "A"—and looked in a general northeasterly or northerly direction, what did you see?

A. A rolling country there, hills and openings.

Q. How far north could you see looking from that point?

A. Oh, I judge a mile perhaps, possibly more.

Q. This was a country you described as having a rolling aspect? [519]

A. Rolling hills, hilly country.

Q. Did you see anything in that country which corresponds to this snake-like drawing marked on Exhibit No. 1 as "Toejam Mountain," running from a point in section 32, and touching apparently a fence line there to the easterly from there; did you see anything that corresponded to that as you looked in that direction?

A. Well, I really don't know just what that is made to represent.

Mr. PLATT.—You don't know whether that is a snake or not, do you?

A. I can describe the country there as it is, but what that is made to represent, I don't know.

(Testimony of Harry Petrie.)

Mr. DENMAN.—(Q.) Did you see anything there in the nature of a ridge or change of elevation, that ran in that direction I have described, which could be demarked from the rest of the country?

Mr. PLATT.—Object to the question as being absolutely leading.

The COURT.—Let him tell what he saw there.

Mr. DENMAN.—(Q.) What did you see there?

A. Well, directly east—

Q. (Intg.) Looking north now across from here, and Toejam Creek to the north.

A. Well, as I have stated before, I saw rolling hills, on the westerly part is a small butte of brown rock and a gap in between, lower end, then a ridge that bore in further to the southeast, and the country generally is smooth; that is a grass country, largely.

Mr. PLATT.—I ask that part of the answer be stricken out as not responsive, the country being a grass country.

WITNESS.—I was trying to describe the nature of the country.

The COURT.—I will let that stand.

A. (Contg.) Because the portion of the country is a grass country, and this butte, as I indicate it, is along Toejam, just at the turn. [520]

Q. (Mr. DENMAN.) You just pointed to the butte, marked "Small Hill" under the figures 32?

A. Yes.

Q. Describe that butte.

A. To the right of that is a sort of lower depression in the mountains, sort of pass; further on is a higher

(Testimony of Harry Petrie.)

mountain to the north, which would correspond very well to the course of this stream along here, range of broken hills in there.

Q. I call your attention to a place marked "Hill" on this map (Defendant's Exhibit "A"); did you look in that direction?

A. Yes, I looked in every direction.

Q. What did you see in that direction; that is to say, from the northeast, from the north point of Nelson's fence?

A. I saw a rolling range of hills, sloping to the south.

Q. Let me ask you as to the character of the country as you looked north, between the hill in section 34 and the small hill in section 32, a distance on the map of about a mile and a half, did you see in there, or is that the country you just described?

A. That is the country I just described, with the exception of the valley that runs on into Toejam, is a slope, and a rise into these hills I have described, and in through there there is a lower country than over here, with a sag in the hills, a depression.

Q. You have just put your finger on the dotted line running from the fence easterly towards this hill, that is correct, is it not?

A. Yes, my impression is, though, it is farther away.

Q. Now, did you go to the point marked by the arrow at the westerly end of this Opening No. 5, where it touches a fence marked "North's fence"?

A. I did.

(Testimony of Harry Petrie.)

Q. Did you look from there in a northeasterly direction, to the north of this hill in section 34?

A. Yes, I looked over all that country to the north and east.

Q. Tell what you saw of the country between the hill in 34 and [521] to the northerly thereof towards Toejam Creek.

A. Well, I saw a range of hills as I described before.

Q. What character of hills?

A. Rolling hills, grassy hills.

Q. What can you say as to that country, with regard to its passability for stock?

A. No possible obstruction that I saw.

Q. How far could you see in this direction I have described to the northerly of the hill in section 34, looking in an easterly direction, from where you stood at this point?

A. Well, several miles, I don't know how far, possibly two or three, possibly farther.

Q. Did you see anything as you looked in that direction that in your opinion would stop the passage of cattle? A. I did not.

Q. Coming to this fence called North's fence, to the point I have just described, that you stood at, at the westerly end of the opening, and where the point of the arrow touches the corner of the fence, where did you go from there?

A. We first followed along the south side of the fence, then crossed through an opening, went inside of the fence, rode a little ways, crossed through an-

(Testimony of Harry Petrie.)

other opening, and went outside, and followed on around the hill until we came to, nearly to Toejam Creek, went through an opening there. crossed the creek, and on below.

Q. When was the first time that you passed by that fence? A. Which part of it?

Q. Any portion of it?

A. About the 18th or 20th of June, 1911.

Q. Describe the condition that you found that fence in.

A. You are referring to the north fence?

Q. Yes.

A. Well, it was down at this point right here, at that time; I didn't go along at that time all this fence; I came around here and struck the fence at about this point, in June. [522]

Q. That point you have described is a point marked "195" there?

A. About there, just a short distance from the corner.

Q. What condition did you find it in?

A. The fence was down, in bad shape; good many posts knocked down, wires down.

Q. When you say "knocked down," what do you mean by that?

A. Probably knocked down by the wind, rotted off, or something of that sort; I don't know what put it down, but I judge age more than anything else.

Q. Describe the condition of the wires on the fence at that time at the point where you saw it, the character of the wire first.

(Testimony of Harry Petrie.)

A. Well, it was a black barb wire, very old, apparently, never been galvanized.

Q. About Opening No. 6, will you describe the condition of the country in the immediate vicinity, say within a distance of a mile, with reference to the topography of that neighborhood?

A. A mile either way?

Q. Well, a mile, say, to the south first.

A. Well, along here is a range of hills; this course along the creek necessarily is a valley, right about this point is bare ground, everything is worn off, it has been used for a long time, apparently, to work cattle on; the—

Q. What can you say—

Mr. PLATT.—Let him go on and finish. I thought you had not finished your answer.

A. Well, I had not finished. I was going to describe the country on both sides of the creek, if you wished it.

Mr. DENMAN.—Yes, if you will.

A. That is the valley here along which the Tuscarora road runs, and here is a stream, and beyond is the rolling hills, smooth, [523] though covered with sagebrush.

Q. How far is the creek from the opening?

A. Oh, possibly 200 yards; I never noticed especially, two or three hundred yards.

Q. What can you say as to the topography of the country leading from the hills into that opening?

A. I don't quite understand your question.

Q. What can you say as to the topography of the

(Testimony of Harry Petrie.)

country leading from this low line of hills from the south into the opening, or between the hills and the opening?

A. This is the valley here along Willow Creek, Willow Creek valley; the road runs right in the valley, and then off to the south are these low hills.

Q. Any openings in the hills north and south?

A. Yes, there is a number of little draws, naturally work toward the stream, and of course this Hot Creek is quite a stream, and has its branches; then there are other little dry draws and runs that work down towards the creek.

Q. Did you ever pass through that country in company with Messrs. Melrose and Flocker?

A. Yes, sir.

Q. And when was that?

A. About the 23d of July, 1911, 22d or 23d, I think.

Q. Pass clean around the fence with them?

A. From the Dutton postoffice up Rock Creek; up Toejam, across Siawappe, down Siawappe, down Willow Creek, and to our starting point.

Q. How did you travel on that occasion; what did you have?

A. We had a Studebaker wagon, two-seated wagon, spring wagon.

Q. You say you travelled along Toejam Creek, and came from there up across and down Siawappe?

A. Yes.

Q. How far along the north side of Toejam did you run before you turned to come in a southeasterly direction? [524]

(Testimony of Harry Petrie.)

A. We didn't run along the north side at all, we drove along the south side.

Q. I mean along the north side of this map; you drove along the south side of Toejam Creek?

A. South side of Toejam Creek.

Q. Where did you leave the creek to come in a southeasterly direction?

A. We left the creek about here, I think (indicating). Mr. Flocker stayed in the wagon, and Mr. Melrose walked the fence; we drove around and struck the North fence right near the—no, we didn't go over the fence, but we came very near the fence, the side of the fence.

Q. Where did you go then?

A. Then we drove to a point across here, to about here (indicating).

Q. How far is that from the spring and the quaking-asps?

A. I don't remember; I took sort of a circuitous route around this way with the wagon, about a mile, I should judge.

Mr. PLATT.—Let me understand; did you drive alone, or who drove across the country?

A. I drove from this point I am describing to the spring, where we ate lunch, Melrose and Flocker walked. Flocker rode with me around this country, while Melrose walked. I have since driven it, however.

Q. As I understand, on that trip across that country you went alone, didn't you?

A. Which part of it?

(Testimony of Harry Petrie.)

Mr. DENMAN.—If you will permit me to conduct the examination.

Mr. PLATT.—I just wanted to understand what he said. He said we drove.

The COURT.—Read the question.

(The reporter reads the record.)

Q. Mr. DENMAN.—Now, whereabouts did you last see Mr. Melrose in that country?

A. Well, we picked Melrose up about this point about the end of the North fence, southeast corner of the North fence, possibly. [525]

Q. Would you say directly above the word “six”?

A. No, there is the corner right there, at that opening.

Q. At the west end of the arrow point?

A. At the west end of the arrow point, southeast corner of the fence.

Q. Where did you go with him then?

A. We drove, as I have described before, across this country here to a point somewhere here, and struck the Nelson fence.

Q. Were Mr. Flocker and Mr. Melrose with you on that drive?

A. They were on the drive from the North fence to where we struck the Nelson fence.

Q. Did either of them leave the wagon during that trip across there?

A. In across here, they both left it at this point described, I don't know the section line.

Q. That is to say, at about the—

A. (Intg.) At a point on the Nelson fence some-

(Testimony of Harry Petrie.)

thing like a mile from the spring where we ate our lunch.

Q. About a mile from the point where you ate your lunch. Where did they go then?

A. I presume they walked this fence, they said they did. I drove around, and we ate lunch together at the clump of cottonwoods, at the spring at the bend of Siawappe Creek.

Q. How long did it take them to walk that fence?

A. I don't remember that, only a short time.

Q. Ten or fifteen minutes?

A. Something like that.

Q. Then you met at the spring?

A. Ate our lunch at the spring.

Q. So on that trip you never got above this point on Nelson's fence, about a mile above the spring?

A. Yes, I would judge it about that.

Q. And you drove directly across the country from the west [526] point of the arrow down through that point here?

A. We drove across something that direction.

Q. You have since driven over it; with whom did you drive over it?

A. I drove over it with Mr. William Denman and a man by the name of Thornton, Mike Thornton.

Q. And you have driven over it since that time, or ridden over it?

A. Rode over a portion of it horseback, of that country horseback, and the rest of it in a machine, automobile.

Q. There has been testimony that you received a

(Testimony of Harry Petrie.)

telegram from William Kent sometime along in the latter portion of May or the first portion of June, 1911; did you receive a telegram from him at that time? A. I did.

Mr. PLATT.—I object, if the Court please, unless I know the purpose of the question.

Mr. DENMAN.—I simply want to show the date of the receipt, so we can fix the time at which these additional openings were made. For the purpose of fixing the time. Withdraw the question.

Q. Did you ever have any conversation at about the time I have indicated with Mr. D. P. Osborne, concerning the making of holes in any of these fences in this country here?

Mr. PLATT.—I object on the ground it is incompetent, irrelevant and immaterial, has no bearing upon any of the issues involved in this case; and further, it has not been shown that any conversation which might have been had between these people could in any wise be a conversation which would bind the defendant company.

The COURT.—Is it to any further issue than to fix the dates?

Mr. DENMAN.—That is all.

The COURT.—I will allow it to be put in; but, as I stated, I don't think the question of intention cuts very much of a figure [527] in the decision of the case. My purpose was, however, to let you introduce that testimony, in order that you might make your point, if you feel my ruling is not correct in that matter.

(Testimony of Harry Petrie.)

Mr. DENMAN.—This is to fix the time at which these openings were made.

The COURT.—I will let the testimony in, and a motion to strike out may be made later. Proceed.

Mr. DENMAN.—(Q.) Did you have a conversation with D. P. Osborne, the latter portion of May or the early portion of May, 1911, concerning the opening of gaps in any of these fences? A. I did.

Mr. PLATT.—I ask for the benefit of an exception on the grounds stated.

The COURT.—I have not admitted the testimony yet. After we are through with this you may move to strike out such portions as you like, and then take the ruling, or if you prefer to have a double ruling now.

Mr. PLATT.—No, I do not desire that.

Mr. DENMAN.—(Q.) What was that conversation? In the first place, what was the date of that conversation?

A. About the last of May, 1911, either the 30th or 31st day of May.

Q. How do you fix that date?

A. By a telegram received.

Q. Have you got that telegram with you?

Mr. PLATT.—Now, if the Court please, I ask the question be stricken out on the ground it refers to a conversation subsequent to the time of bringing this action, and could therefore have no bearing on the issues involved in the case.

Mr. DENMAN.—I will show that the conversation

(Testimony of Harry Petrie.)

occurred on May 30th, and the telegram was received on that day.

Mr. PLATT.—I am making the additional objection, if the Court [528] please.

The COURT.—Very well.

Mr. DENMAN.—(Q.) Have you the telegram with you?

A. I am afraid not; I have a lot of papers at the hotel, and I am afraid it is with them.

Q. Can you get it? A. Yes, I can get it.

Q. Well, I will call the witness later on this point. Do you remember the date of that telegram?

A. I remember the date of it, May 30th.

Mr. PLATT.—I object to the date of any written instrument; if they are going to offer it in evidence, the date is the best evidence.

Mr. DENMAN.—That is a fair objection.

Cross-examination.

Mr. PLATT.—(Q.) Now, you are the manager of the Golconda Cattle Company, are you not?

A. I am; yes.

Q. And you have been manager since July 1st, 1911? A. July 1st, 1911.

Q. And the first time you ever went upon the country, or visited the country as shown upon both exhibits, was June 18th or 20th, 1911?

A. All the country, yes, that I described, and my trip over a portion of it, as I stated, in April.

Q. Generally speaking, what portion did you visit early in April?

A. From the Dutton postoffice to a point about

(Testimony of Harry Petrie.)

two miles above the dam, a distance of about 14 miles.

Q. Well, it was along Willow Creek, wasn't it?

A. Up Willow Creek, yes.

Q. Did you make a visit in November, 1911?

A. No, I think not, I think it was October. [529]

Q. In October, 1911?

A. That is my recollection, yes.

Mr. DENMAN.—May I ask a question at this point? (Q.) That was the visit you made with me in October?

A. Yes.

Mr. PLATT.—(Q.) Prior to your visit in October, 1911, did you make a trip around this fence as shown upon the plats, with a view of ascertaining the character of the so-called inclosure?

A. No, that was not the purpose of my trip.

Q. Well, prior to your visit in October, did you ever make any trip with a view of ascertaining as to the general character of this so-called inclosure?

A. No, I don't think that was ever the purpose of my trip.

Q. What was the purpose of your trip?

A. Why, my first trip in June, 1911, was to ascertain the nature of the country, and the condition of the fences, and so forth.

Q. Now, then, in June, 1911, was the first time you made a trip for the purpose of ascertaining the nature of the country, and the condition of the fences?

A. As a complete whole; I had been through that tract of land, but on other business, but never had covered the whole territory.

(Testimony of Harry Petrie.)

Q. And never before that time had you made a trip for that purpose over the whole territory?

A. No.

Q. Now, before June, 1911, had you any accurate knowledge as to the actual number of gaps in the so-called inclosure? A. I had not.

Q. You had not? Then every bit of knowledge which you acquired, that is, accurate knowledge, concerning that inclosure, was acquired after, sometime after June, 1911?

A. It was after my first trip, yes.

Q. What generally, Mr. Petrie, is the character of the country outside of the so-called inclosure, and south of Willow Creek? [530]

Mr. DENMAN.—Object to that on the ground that in so far as it extends to the west of Hot Creek it is not proper cross-examination, we have not touched that.

The COURT.—The objection will be sustained so far as the question applies to any territory more than a mile west of Opening No. 6.

Mr. PLATT.—You insist upon that objection?

Mr. DENMAN.—I don't want to open up the whole case.

Mr. PLATT.—(Q.) What is the character, general character of the country, if you know, Mr. Petrie, northwest and north of the northwesterly and northerly line of this so-called inclosure?

Mr. DENMAN.—That question is not cross-examination.

Mr. PLATT.—I take the ruling of the Court.

(Testimony of Harry Petrie.)

The COURT.—I will allow it.

A. That is a hilly, mountainous country, rolling hills both northwesterly and north.

Mr. PLATT.—(Q.) A hilly, mountainous country?

A. Well, so-called here, yes, mountainous; it is comparatively smooth, rolling hills all through that section.

Q. You say it is a hilly, mountainous country, then you say it is composed of comparatively smooth hills; now, which do you mean?

A. Well, I mean comparatively smooth hills. If you give me the opportunity I will explain my reason for making that remark.

Q. I want to know.

A. It depends entirely where a person has been most of his life what he considers mountainous, that is the point.

Q. Do you think in the parlance of this country, when you said that was hilly, mountainous country, it would so be considered in Nevada?

A. Well, not extremely mountainous, no; it is a country of rolling hills, some of them may be large enough to be called mountains in Nevada, they would not be where I came from. [531]

Q. Do you know the distinction between extremely mountainous and mountainous? A. I think I do.

Q. Then they might be called mountainous but not extremely mountainous?

A. Well, possibly; that depends, of course, upon the party designating their character; I think that has a great deal to do with it.

(Testimony of Harry Petrie.)

Q. What would you say as to this section of country up in the northeast here, indicated in the blue upon the plat?

A. That whole section north of those streams is very similar there, rolling hills, and mountains perhaps, to some people, not to me, anyway.

Q. Would you call that a hilly, mountainous country?

A. Along about the same line as the other, for the same reasons, yes. It is a country of rolling hills.

Q. Now, let me ask you, Mr. Petrie; as a matter of fact, is it not more hilly and mountainous up in this northeast section than it is several miles back here, along the northerly border line?

A. That is true as regards a portion of the country, but untrue as regards the other; certain sections in that country quite as rough as this is, I think even more so.

Q. You think there are certain sections north of this section that are quite as rough as the section in the northeasterly corner of the plat?

A. Yes, I think more so.

Q. You think more so?

A. Yes. I can designate the country, if you wish.

Q. I wish you would.

A. That is the country lying directly north, where Walker's fence extends on; the map is not large enough.

Q. What do you mean, the north fence?

A. Yes, we call this the Walker field. This is lambing country [532] up here of Noble's, and it

(Testimony of Harry Petrie.)

is a summer range for cattle; this whole country at the head of these streams. Right in here towards the head of Trout Creek is a pretty rough country, however, cattle range back and forth onto the desert, and both ways, continuously.

Q. No question about cattle ranging over that country to the north, is there?

A. Are you addressing me?

Q. Yes. A. No, sir, none whatever.

Q. You are pretty well satisfied that cattle can range on the outside of this so-called inclosure to the north, quite freely?

A. Range all over this entire country freely, the part I have been in, and I have covered this entire part, up all through here.

Q. And they could range along the northwesterly line quite freely on the outside?

A. No question about it.

Q. And sheep likewise?

A. No question about it.

Q. And I now repeat the question, could they range southerly from that line quite freely?

A. What point, all of it?

Q. Yes. A. No, cannot all of it.

Q. What parts can't they?

A. Down in this section is a big mountain range with an opening that Rock Creek passes through; there is a little obstruction on through this territory here in the way of mountains, until you come to these streams that run on, they run into Willow Creek, many of them are not shown on this map because

(Testimony of Harry Petrie.)

they are dry part of the season.

Q. Do you know the name of those mountains?

A. No, I have not heard that called.

Q. Did you ever see any cattle or sheep grazing within this so-called inclosure on any of your trips?

A. Yes, sir, lots of them.

Q. About how many head? [533]

A. Both, referring to cattle or sheep?

Q. Cattle and sheep.

A. Well, I saw, presumably, 10,000 in one day in here, in either April or May, 1911.

Q. What were they, cattle or sheep?

A. Those were sheep that I speak of.

Q. Do you know what they were eating?

A. Why, they were eating a little, a few weeds of various kinds, and some grass; there is a weed there, I don't know the name of it, I can describe it to you; it is not much of a bottom, however there is a variety of weeds in there up through this section; down here, I have never seen any sheep in this lower part, but over here in that valley, right on the stream.

Q. But there is no question about your seeing them upon this land shown in the white, is there, within the inclosure?

A. No, sir, no doubt about it at all.

Q. How much higher in elevation, if you know, is this section of country up in the northeast corner of the Government's plat, as compared with the southwest section of the plat?

A. Well, sir, I could not tell you, I don't know what the fall of that stream is; that distance there

(Testimony of Harry Petrie.)

is about 12 or 18 or 19 miles.

Q. Which way from those does Rock Creek and Willow Creek run?

A. Rock Creek runs southwest, Willow Creek takes a good deal the same course, as shown here.

Q. That is, the source of those creeks, as I understand it, is up in this direction, in a northeasterly direction?

A. Not of Rock Creek, no—well, yes, Rock Creek heads back here; it runs up this way and circles around through that country, inside of the north fence, or the Walker field as we call it.

Q. As a matter of fact, the sources of these creeks are up in [534] the mountains, is not that true?

A. Yes, it is always true.

Q. And how about Willow Creek,—does the same apply to that?

A. Well, Willow Creek heads farther east than the others, a little bit; it is over south of the Tuscarora country.

Q. Do you know when Opening No. 6 upon the plat was made? A. I do not.

Q. Do you know when Opening No. A was made?

A. I do not.

Q. Do you know when any of the openings were made?

Mr. DENMAN.—Where?

Mr. PLATT.—In the fence?

A. Not as to the exact date, no.

Q. Well, have you any knowledge as to when any of them were made, approximate dates, I mean—I

(Testimony of Harry Petrie.)

mean accurate knowledge as having been there, and being able to testify about it.

A. You have already asked that question. My first accurate knowledge was about the 18th or 20th of June.

Q. I am just asking you specific questions now as to these various gaps. As I understand it, you have no accurate knowledge?

A. If accurate knowledge is necessary that I should have been there, no; otherwise, yes.

Q. Well, can you testify upon oath as to any approximate dates when any of the gaps as indicated upon the plats were put in that fence?

A. Now, in order to do that what knowledge is it necessary for me to have? I want to know just the situation.

Q. Well, you are on the witness-stand, Mr. Petrie, I am leaving it to you; can you testify on oath?

A. Well, I want to find out the question before I answer it.

Q. Can you testify upon oath as to an approximate date or dates of your own knowledge, as to when any of those gaps were put in that fence? [535]

Mr. LEWERS.—May I ask whether that excludes hearsay?

Mr. PLATT.—Why, certainly it excludes hearsay.

A. I have already answered that question.

Q. So far as your knowledge is concerned, that includes what somebody else told you?

A. Certainly.

Q. Well, that is not absolute knowledge. Do you

(Testimony of Harry Petrie.)

remember whether Mr. Flocker got out of the wagon and went over here to Opening No. 6 to measure it?

A. I don't think he did; he might have, but my recollection is that Mr. Melrose did that work, and Mr. Flocker sat in the wagon near there where I turned the team around, there is a spring in there, and they fed right at that point, and I turned in there and drove around, and they walked down the fence, as I recollect it.

Q. Did you see Mr. Flocker measuring Opening No. 6?

A. I don't remember that he did measure it; I don't remember seeing, or as to whether he did or not; I remember Melrose walking across Opening No. 6.

Q. You don't remember whether Flocker did or not, is that true?

A. No, not definitely; I don't remember whether he did or not.

Q. Did you notice him measure any of the openings?

A. No, I don't have any recollection of that.

Q. You would not say that he did or did not?

A. I am under the impression I would remember it if he did, but I would not state positively that he did not, because I don't remember the circumstance.

Redirect Examination.

Mr. DENMAN.—(Q.) You say you saw cattle in there in that inclosure in the month of May and June, 1911?

(Testimony of Harry Petrie.)

A. Yes.

Q. How many different brands?

A. I could not say as to that; I could not testify regarding that; I saw cattle but I was not [536] paying any attention to them, because I was looking after the sheep, saw them at a distance, but didn't ride close enough to examine the brand.

Q. Do you know what sheep they were?

A. About this location a man by the name of Nelson had a band of ewes, and he afterwards moved up through this country.

Q. That was that 10,000 sheep you spoke of?

A. No, the Pitchfork outfit had a band right out, had a band right there on the stream, on Toejam, and they ranged both ways in these little hills to the north, and this way.

Q. How about cattle, how many head of cattle did you see in there?

A. I could not state as to numbers; cattle were scattered down through this end of it, and once when I got up here I saw a few at a distance, but I didn't ride through that, I was following lambing camps, going from one lambing camp to the other.

Q. Where were the cattle, on the upland or along the creeks?

A. Some few along the upper part of the edge of these hills, and some along down on this stream, in the lower part, on Rock Creek.

Q. When you were up there in June or July that year, did you see any cattle in there then?

A. I don't recollect seeing any in there, I might

(Testimony of Harry Petrie.)

and might not, I don't remember about that; I remember seeing some through this country up here.

Q. Where is that?

A. Between Toejam and Siawappe, there is a rolling, smooth, grassy hill along here, little valley, then there is a rise to these high hills beyond; they were in the valley and on the side of that.

Q. Where is it with reference to Opening No. 5 marked by the arrow point from here to here?

A. Well that is the corner fence, I think we were about there when we stopped, and I called [537] attention to cattle here, and beyond, a few head there, possibly 10 or 12.

Q. How far off were they?

A. Oh, half a mile to a mile.

Q. What direction? A. Northeast.

Mr. DENMAN.—Take the witness.

Recross-examination.

Mr. PLATT.—(Q.) Where do the high hills rise beyond northeasterly from where you pointed?

A. Where?

Q. You spoke about a rise to the high hills beyond; how far from the southeast corner of section 6, township 40 north, range 49 east, in a northeasterly direction, do the high hills rise beyond?

A. You misunderstood me; right there, begin about this place (indicating).

Mr. DENMAN.—You are pointing now to what, to the northeast quarter of section 5?

A. I would say that is about the location.

Mr. PLATT.—I don't think I misunderstood your

(Testimony of Harry Petrie.)

testimony. Didn't you testify there were high hills rising beyond?

A. Beyond what?

Q. Beyond the point from which you stood?

A. Yes, but I say that is the point.

Q. What is the point?

A. Point about there, in that northern part of section 5; I never testified as to that point.

Q. I am asking you now whether you know how great a distance it is from the southeast corner of section 6, township 40 north, range 49 east, to the high hills to the northeast?

A. To go across that section, I would have to add a little over a mile to it; my other testimony was probably about a mile.

Q. I don't want you to misunderstand my question. A. I don't want to. [538]

Q. You understand it, don't you?

A. I think so; repeat it.

Q. I ask you how far it is from the southeast corner of section 6, township 40 north, range 49 east, in a northeasterly direction before you strike the high hills beyond.

A. Possibly a little over two miles, approximately two miles.

Q. And there is no question about that in your mind, is there? A. I don't think so; no.

Q. Do you know whether the cattle and sheep you saw grazing within this inclosure you observed before or after this suit was brought?

Mr. DENMAN.—Just give the date of the suit.

(Testimony of Harry Petrie.)

Mr. PLATT.—State the month and the year in which you saw the cattle and sheep grazing within that inclosure.

A. Either April or May, probably the latter part of April, possibly the early part of May.

Q. Of what year? A. 1911.

Mr. PLATT.—That is all.

Redirect Examination.

Mr. DENMAN.—(Q.) When you speak of high hills beyond, where are they with reference to the rolling hills you referred in that same country?

A. Well, they are the same hills; these are high simply because they are a trifle higher as a natural consequence the farther up the stream you go.

Q. When you say “these here,” you refer to the hills in 32 and 33, township 40 north, range 49 east?

A. Right in about that location the country is a little higher than this pass between there.

Mr. PLATT.—What location, just point that out.

[539]

A. I have not stated these township and range numbers; I can indicate what I mean on the map; point about here.

Q. Where Toejam Mountain is represented on the map here?

A. My impression is a little further than that; it is about there, not over half a mile, probably not over half a mile either way from this representation.

Mr. DENMAN.—(Q.) Let me ask you so I won't be confused: Are those the hills you referred to as having been seen by you from the west point of the

(Testimony of Harry Petrie.)

arrow, when you stood at North's fence, is that correct?

A. Those are the hills.

Mr. DENMAN.—That is all. [540]

[**Testimony of Mike Thornton, for the Defendant.**]

MIKE THORNTON, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. What is your name?

A. Mike Thornton.

Q. What is your occupation?

A. Ranch foreman.

Q. What has your business been for the last ten years?

A. Working with cattle, ranching and stock farming.

Q. How long have you worked with cattle?

A. On and off all my life.

Q. How old are you? A. Forty-three.

Q. How much of that experience has been in Humboldt County? A. About five years.

Q. What is your present occupation?

A. Ranch foreman.

Q. For whom?

A. Golconda Cattle Company.

Q. How long have you had that position?

A. Three years and a half; that is, with cattle and ranch foreman connected.

Q. Are you acquainted with that country which

(Testimony of Mike Thornton.)

lies between Rock Creek, Toejam Creek, Willow Creek and Siawappe? A. Yes, sir.

Q. Driven cattle through there? A. Yes, sir.

Q. Have you ever been in this country shown on this map here, Exhibit "A," as lying between what is called North's fence and Nelson's fence?

A. Yes, sir.

Q. Have you ever been in the country to the north-east of that? A. Yes, sir.

Q. How far have you been to the northeast of there? A. About four miles.

Q. And how far from this corner of Nelson's fence in the middle of the south line of section 33, how far northeast from that? [541]

A. About four miles.

Q. You are familiar with that country in there, are you? A. Yes.

Q. Now, I will ask you, standing at this corner indicated here by the east point of the arrow at this opening, and looking towards a place marked as a hill on the map here, have you ever looked in that direction? A. Yes, sir.

Q. Ever ridden in that direction? A. Yes, sir.

Q. What was your purpose in riding there?

A. Working cattle.

Q. What was your purpose in going 4 miles east of there?

A. Driving cattle out of that country.

Q. When was the last time you were in there?

A. Working cattle?

Q. Yes. A. In April and May of last year.

(Testimony of Mike Thornton.)

Q. 1911? A. Yes.

Q. Did you pass through this opening between North's fence and Nelson's fence at that time?

A. Yes, sir.

Q. Did you gather any cattle there?

A. No, I went out from there looking for beef cattle, on the outside; I drove beef cattle back from there.

Q. For what were you gathering those beef cattle?

A. Golconda market.

Q. How far back did you have to go to gather them?

A. Out on that mountain and back to Rock Creek.

Q. I will ask you to look at this other map up here on which is drawn a long snake-like thing called Toejam Mountain, do you see that? A. Yes.

Q. Did you ever see anything like that in that country before? A. No. [542]

Mr. PLATT.—I submit that is a very unfair question. It has been asked of every witness yet, as to whether he saw anything like that thing on the map up in that country before; and there is not one witness who has been asked that question who knows what the question means.

Mr. DENMAN.—(Q.) Well, Mr. Thornton, when you went back 4 miles into this country on which side of that hill did you pass? A. Both sides.

Q. What can you say as to the character of that country on the north side of that hill, between that hill and Toejam Creek country to the north?

A. Gradual slope.

(Testimony of Mike Thornton.)

Q. What can you say as to its character with regard to the vegetation on it?

A. Good grazing land.

Q. What can you say as to the existence of any obstructions to the passage of cattle in this space between the hill and Toejam Creek to the north.

Mr. PLATT.—Same objection, calling for the opinion or conclusion of the witness.

The COURT.—He can tell what he saw there that would have any tendency to stop or turn cattle.

A. Nothing to prevent cattle going either way, coming or going.

Mr. DENMAN.—(Q.) You say you were in this country in the month of April and May, 1911, and I asked you whether or not you were in the country marked in the white on this map between these creeks? A. Yes.

Q. I ask you whether you saw any cattle in there?

A. Yes, saw cattle in there.

Q. Tell me what brands you saw on the cattle in there. A. I saw "25."

The COURT.—This was in April and May, 1911?

Mr. DENMAN.—Yes, your Honor. [543]

Q. What brands did you see in there at that time?

A. "25," "P. Bench," "C. S.," "S. L.," "Rolling-pin."

Q. What else?

A. Well I don't remember all of them, several different irons.

Q. Now, you said "C. S."; whose brand is that?

A. The Bliss Brothers.

(Testimony of Mike Thornton.)

Q. And where is their home ranch?

A. On the Humboldt, below Golconda.

Q. How many miles away? A. It is 60.

Q. The "P. Bench" cattle, whose are those?

A. Moffatt.

Q. Where is their home ranch?

A. About 40 miles from Dutton.

Q. In what direction? A. North.

Q. Now, the "Rolling-pin," whose brand is that?

A. Fairchild's.

Q. Where is their home ranch?

A. Thirty-five miles from Dutton.

Q. Which direction? A. North.

Q. What other brand did you mention?

A. "S. L."

Q. Who owns the "S. L." brand?

A. Taylor and Reed.

Q. Where is their place?

A. About 40 miles north.

Q. Now, let me ask you as to the passage of sheep through this country. Is there any well-defined line of travel of sheep moving through that district between these creeks I have described; is there any well used line of travel in that country of sheep going through?

A. Yes, they travel all through that country.

Q. What is the regular line of travel, if any?

A. Northeast.

Q. Where did they come into that district?

A. From the west.

Q. Is there any place they come in at? A. Yes.

(Testimony of Mike Thornton.)

Q. Whereabouts? Point it out on the chart here, if you will examine Exhibit No. 1.

A. Right here (indicates). [544]

Q. That is Opening No. 1? A. Yes.

Q. Now, can you tell me how many, if any, bands of sheep passed through Opening No. 1, as far as you know, in the spring of the year 1911?

A. Sixteen, I think.

Q. Sixteen bands?

A. I am not sure of the number, but I should judge about 16.

Q. Does that road pass over the land marked in white here? A. Yes.

Q. I am now referring to the land in sections 34, 35 and 33 in township 39 north, range 47 east. Just come and look, and see if that is the place you referred to. A. Yes, sir.

Q. You say there was 18 bands passed through there? A. Sixteen, to the best of my memory.

Q. To whom did those bands belong?

A. Tom Nelson, Golconda Cattle Company.

Q. Who else?

A. Mostly Tom Nelson's. Well, Stewart, I don't remember him passing through there last year; he passed the year before, I think.

Mr. PLATT.—Well, do you know that he passed the year before?

A. Yes, I know that he passed in 1909.

Mr. DENMAN.—(Q.) In 1909? A. Yes.

Q. That same road? A. Yes.

Q. What other bands passed through there, either

(Testimony of Mike Thornton.)

stopping or passing through, to go beyond?

A. That is all I remember of; I wasn't around there much when sheep were travelling through.

Q. Where were you then?

A. On the river, Humboldt.

Q. Do you know what bands have passed through there in the past?

A. No, not only those sheep I have mentioned.

Q. Do you know of any bands passing through there, going into the higher country on beyond to Tuscarora? A. Nelson's, Tom Nelson's. [545]

Q. How long have you been in there?

A. On and off for two years and a half; I have not been there all the time, you know, on different ranches.

Q. Oh, there is one thing, you were speaking of passing some 4 miles beyond Opening No. 5 in a northeasterly direction in search of beef cattle, what can you say as to any cattle trails passing through there, through that country? A. Several of them.

Q. Several cattle trails? A. Oh, yes.

Q. What can you say as to the possibility of taking a wagon from this opening in a direction 3 miles east of there? A. You can go there with a wagon.

Q. You could? A. Yes.

Q. Describe the trails. You say there are several trails in there; describe them, as to what you saw of them, as to their size and direction.

A. Running north and northeast.

Q. Running north and northeast? A. Yes.

Q. How deep were they?

(Testimony of Mike Thornton.)

A. Well, an old trail there is wore 3 or 4 inches deep.

Q. How far easterly does that trail run from this opening?

A. It runs to Tuscarora, it follows the road, I guess.

Q. Then cattle can reach the road to Tuscarora going through that opening, can they? A. Yes.

Q. Without passing any obstructions? A. Yes.

Mr. DENMAN.—That is all.

Cross-examination.

Mr. PLATT.—(Q.) You know you can go over the top of the Sierra Nevada Mountains with a wagon, don't you? A. Yes.

Q. Is that what you mean by going over those mountains in a wagon? A. No.

Q. What do you mean?

A. These are rolling hills, not mountains. [546]

Q. You can get over them anywhere in a wagon, can you? A. Yes, through that pass.

Q. Oh, through the pass?

A. Through that pass.

Q. Where is the pass?

A. Right at the corner of those two fences.

Q. I wish you would show me the pass on the map.

Mr. DENMAN.—Which map?

Mr. PLATT.—I don't care, either map.

A. Right here (indicating).

Q. Now, just show the Court; you say right through there? A. Right through there.

Q. Do you limit it from section 6, into where?

(Testimony of Mike Thornton.)

A. Limit it anywheres through this country.

Q. How far northeast does it go?

A. Well, it goes as far as I have been.

Q. How far have you been?

A. Four miles, or 5.

Q. Can you show it on the plat. Do you mean to say there is a wagon pass running clear from these hills to the northeast?

A. No, it is not a wagon pass, but you can go there with a wagon.

Q. How wide is the pass?

A. Well, I should judge a quarter of a mile, or half a mile, that is not rough; it is smooth ground.

Q. Now, is the rest of the country around there pretty mountainous? A. No, not mountainous.

Q. Well, is it hilly? A. Yes, hilly.

Q. It is hilly, is it? A. Just rolling hills.

Q. It is more hilly, is it not, up in this northeast corner than it is down here along the white, as represented on the plat. [547]

A. Some places, but the way that pass is there, it is about the same.

Q. Now, you know as a matter of fact, don't you, this is a more mountainous country up here in the northeast than it is down here in the white?

A. Well, some places a little more.

Q. Wouldn't you call that a more mountainous country than you would down through here in the white? A. No, not on all the white.

Q. Not on all the white?

A. There are some mountains on the white there

(Testimony of Mike Thornton.)

that is higher than they are up there at the pass.

Q. Do you mean to say any mountains over on the white, or up on the northeast?

A. After you get up high enough, yes; one mountain there, Toejam Mountain, is the highest mountain there, but that is a mile and a half or two miles back of the pass.

Q. Oh, there is a Toejam Mountain there, is there?

A. Yes, call it a mountain.

Q. In the meantime there is a mountain there called Toejam Mountain? A. Yes.

Q. Is that so? There is a rocky mountain—

A. (Intg.) I call it Toejam Mountain, I never heard the name of it. I have drove cattle off the top of it and all around it.

Q. And you have always heard it as Toejam Mountain?

A. I have never heard it as Toejam Mountain, no.

Q. How do you happen to call it Toejam Mountain?

A. It stood in there by itself; it is not a mountain either, because cattle climb over, back and forth, over the top of it.

Q. I wish you would step to the plat, and read this inscription here called Toejam Mountain; was there a mountain called Toejam Mountain in that vicinity?

A. I have never heard of it, I call it that.

Q. You say you knew of Toejam Mountain, didn't you? [548]

A. I knew of it by calling it that.

Q. That is the name you have always given it, is it not?

(Testimony of Mike Thornton.)

Mr. DENMAN.—Given what?

Mr. PLATT.—That mountain up there as Toejam Mountain.

A. I don't know whether that is the mountain or not; that is a little different shape from what I have reference to.

Mr. DENMAN.—By that you refer to this Toejam Mountain drawn on the map?

A. No, that is not Toejam Mountain.

Mr. PLATT.—(Q.) How do you know that is not Toejam Mountain?

A. The way it lays.

Q. Have you ever investigated, or talked with any person who drew this map, to find out what that meant upon the map indicated as Toejam Mountain?

Mr. DENMAN.—Object to the question as incompetent, irrelevant and immaterial.

Mr. PLATT.—I am bringing this out because I made the suggestion to your Honor a while ago that every witness counsel has examined concerning this thing up in the corner, he has asked the witness whether that correctly represents anything, and I made the suggestion to your Honor that the witness did not understand, and I am trying to show that this witness does not understand.

The COURT.—Proceed.

Q. Now, as a matter of fact, you don't know from any study you have made of this plat, or from any effort you have made to find out what these inscriptions on the plat mean, you don't know from any investigation just exactly what that means, do you?

(Testimony of Mike Thornton.)

A. No.

Q. All you know is that this thing up here is characterized as Toejam Mountain; isn't that all you know about it? A. Yes.

Q. You haven't any knowledge whether that thing there is supposed [549] to run in a northwesterly or southeasterly, or northeasterly and southwesterly direction, have you? Do you know that of your own knowledge? A. No.

Q. Not of your own knowledge; but you do know that up in that section of country somewhere there is a mountain called Toejam Mountain; you know that, don't you?

A. I never heard it called Toejam Mountain; I have called it that myself.

Q. You have called it Toejam Mountain?

A. Yes, working through there.

Q. Working through there, driving cattle, you have called it Toejam Mountain, haven't you?

A. Yes.

Q. You don't know when the indictment against the Golconda Cattle Company was returned, do you?

Mr. LEWERS.—The indictment?

Mr. DENMAN.—There is no evidence here of any indictment whatsoever.

Mr. PLATT.—Is there an objection to the question?

Mr. DENMAN.—Object to the question on the ground there is nothing in evidence concerning the indictment, and that the question is incompetent, irrelevant and immaterial.

(Testimony of Mike Thornton.)

Mr. PLATT.—If the Court please, I am endeavoring to bring out the fact after the Golconda Cattle Company, the defendant in this case, was informed of the fact that an indictment had been preferred against them, and charges were being made against them, they were very liberal in the use of that unlawful inclosure. That is the only object of the question.

Mr. DENMAN.—Object to the question as incompetent, irrelevant and immaterial; it has no application to any issues set forth in the pleadings in this case, and there is no evidence to show there [550] was any indictment concerning any of the land involved in this case, and I believe the District Attorney will admit there is no indictment concerning any of the land involved in this case.

Mr. PLATT.—Not in this case, but it is an indictment against the same company concerning unlawful inclosure.

Mr. DENMAN.—And there is no testimony showing that the witness knows anything about the indictment.

The COURT.—The testimony will be admitted simply for the purpose of showing what use was made of the lands. Can't you fix the date by ascertaining what use was made in 1909, and what use was made in 1910?

Mr. PLATT.—I can fix it from the record, and what was made in 1911.

Q. How long have you been foreman?

The COURT.—He has been there three years.

(Testimony of Mike Thornton.)

Mr. PLATT.—Three years and a half?

A. In Squaw Valley.

Q. How do you keep track of the cattle and sheep that go through this road on the westerly border, how did you happen to keep track of them?

A. I am not positive how many went through there; I am only judging from the size of the bands they take in there, that they took 7 or 8 bands of sheep.

Q. Have you any method at all of keeping track of just how many cattle or sheep go through there?

A. No.

Q. Did you as foreman try to find out what cattle and sheep were grazed in there last year?

A. No, sir.

Q. Have you as foreman ever gone upon these lands represented in the blue in order to ascertain whether any of the sheep or cattle grazing upon the white or the blue, were in fact grazing upon the blue? A. No, sir.

Q. Never have done that while you were foreman?

A. No. [551]

Q. You cannot state of your own knowledge then just exactly how many cattle or sheep were grazed upon the white, can you? A. No.

Q. You are just giving an approximate estimate?

A. Yes.

Q. Do you know how many cattle or sheep grazed in there in 1910?

A. No, I do not, not positive; I know there was sheep or cattle in there.

(Testimony of Mike Thornton.)

Q. When did you say they grazed in there in 1910?

A. September, cattle, no sheep.

Q. Cattle? A. Yes.

Q. Didn't you see any sheep?

A. Not in September.

Q. Did you see them in 1910 at all? A. Sheep?

Q. Yes.

A. No, I wasn't there in the spring of 1910.

The COURT.—(Q.) Were the sheep there at any other portion of the year than the spring?

A. No, sir, just the spring.

Mr. PLATT.—(Q.) As I understand it, the cattle or sheep that did get access into this field during the year 1911 about which you have accurate knowledge, came through Opening No. 1, or where this road runs in?

Mr. DENMAN.—There is no statement as to where the cattle came in.

A. Well, the sheep were in there, and I don't know how many sheep—I am sure part of them went through that lane, because I saw their tracks, and the sheep were in there when I was in there in April and May.

Q. They were already in there?

A. They were already in there.

Q. How about the cattle, were they in there too?

A. Yes.

Q. Do you know how they got in, from where?

A. Different places outside, they drifted in there.

Q. Do you know that, I don't want any guesswork?

A. Yes, I know that. [552]

(Testimony of Mike Thornton.)

Q. Did you see them come in?

A. No, I didn't see them come in.

Q. Then how do you know?

A. How do I know what?

Q. How do you know they drifted in from different places?

A. They were in there; that is all I know.

Q. You know that you saw them in there?

A. Yes.

Q. But you can't say where they came from, can you? A. No.

Q. You would not testify whether they came through this road, would you? A. No.

Q. And you would not testify that they came through any other place, except that road, would you?

A. No, I never saw any of them going in there.

Q. Never saw any of them go in? A. No.

Q. Do you know anything about Opening No. 3 and Opening No. 4, as shown upon the plat,—do you know when they were made in the fence?

A. I have not paid much attention to those openings; I could not tell you exactly.

Q. I just want to know. You don't know when they were built, do you?

A. No, I don't know whether those are the same openings or not; I never paid much attention to openings.

Q. You haven't paid much attention to any of the openings in the fence, have you, anywhere upon the fence, as shown on the plat? A. No, sir.

(Testimony of Mike Thornton.)

Q. Didn't you testify in direct examination that a lot of cattle and sheep came through this opening in the road—didn't I understand you so to testify?

A. Sheep would.

Q. Only sheep?

A. Sheep, that is all I know of.

Q. And you say you know that because you saw the sheep tracks?

A. I saw the sheep tracks, yes. [553]

Q. But you never saw any cattle come through that way, did you?

A. No, I have never saw any cattle.

Q. All you have seen is the cattle grazing on the lands in there? A. In the field.

Redirect Examination.

Mr. DENMAN.—(Q.) Do cattle ever drift in a direction from westerly to easterly on that land?

Mr. PLATT.—I submit that is mere speculation, not based on any knowledge.

A. Yes, they drift in there, but I never saw them going there.

Mr. PLATT.—I ask that the answer be stricken out on the grounds stated in the objection.

Mr. DENMAN.—Consent.

The COURT.—The answer will be stricken out.

Mr. DENMAN.—(Q.) You said you saw cattle in there also in the month of September, 1910?

A. Yes.

Q. What brands did you see in there then?

A. Well, all the different brands belonging in that country, I can't remember all of them.

(Testimony of Mike Thornton.)

Mr. DENMAN.—That is all.

The COURT.—(Q.) Where do the sheep return from the northern country, what road do they take?

A. I could not very well tell you that either; some of the sheep come through that country through there. Tom Nelson's sheep come through there last fall; most of the sheep come down Rock Creek north, and Fraser Creek, west.

Mr. DENMAN.—(Q.) Where is Fraser Creek?

A. West.

Q. To the west of that? A. Yes.

Q. I want to ask one other question on direct examination that I forgot. Where is Gold Circle from here? A. West. [554]

Q. How far is it from here,—how far is it from the boundary line of this fence on the west side of Rock Creek? A. About 6 miles.

Q. Are you sure of that?

A. Well, it is a little further; I think it is 5 miles and $\frac{7}{8}$ from Dutton, and I think it is a little further from there.

Mr. DENMAN.—That is all.

(Court adjourns until Tuesday, March 12th, 1912, at 10 A. M.) [555]

Tuesday, March 12th, 1912, 10 A. M.

Mr. PLATT.—If the Court please, on yesterday Mr. Denman asked me to give him for his inspection a map which Mr. Flocker originally returned to me. I think this is the map, and if he desires, I have no objection to his looking at it.

Mr. DENMAN.—The map you showed me was on

(Testimony of Mike Thornton.)

different colored paper, as I recollect it.

Mr. PLATT.—No, this is the only plat I have as showing the return on this property. I freely exhibited this map, and also a plat I had on the Rock Creek inclosure, but I don't suppose you want the Rock Creek inclosure now. If you want to see that I am quite willing you should.

Mr. DENMAN.—Oh, no, I can see that in due time, if necessary.

Mr. PLATT.—This is a lead pencil sketch, and we did not introduce it in evidence, because the other is an ink sketch, finished up.

Mr. DENMAN.—Call Mike Thornton, please.
[556]

MIKE THORNTON, recalled.

Mr. DENMAN.—(Q.) Mr. Thornton, I want to ask whether upon that visit in the months of April and May, 1911, when you were looking for beef cattle, you visited what is known as Noble's fence?

A. Yes, sir.

Q. What was the condition you found that fence in at that time? A. The condition was bad.

Q. Would it hold cattle? A. No.

Q. What did you see?

A. Well, the fence was down, posts down.

Q. What was the condition of the posts that you saw? A. Rotten.

Q. About the wire? A. The wire was broke.

Q. Now, just come to this map, if you will, please. Here is Opening No. 6 on the map; just to the east of the reservoir or lake, you notice that the lines there

(Testimony of Mike Thornton.)

terminate with a sort of a "T" crossing, first, they go up, and then sort of a "T" crossing; is there anything like that there? A. No.

Mr. PLATT.—I think there are two lines made there in order to emphasize the aperture, if the Court please; I don't think the fence actually runs that way.

Mr. DENMAN.—There is nothing in the notation to show that.

Mr. PLATT.—As I understand it, you mean the two parallel lines at the end of the aperture?

Mr. DENMAN.—About a thousand feet long.

The COURT.—It is simply an opening, that is all?

Mr. PLATT.—That is all, if the Court please.

The COURT.—There is no double fencing?

Mr. PLATT.—I don't think so. Is that so, Mr. Flocker? [557]

Mr. FLOCKER.—No, sir.

Cross-examination.

Mr. PLATT.—(Q.) When did you see that North's or Noble's fence?

A. April and May, 1911.

Q. What were you doing in that country then?

A. Getting beef cattle.

Q. Where were you getting it from?

A. Up on Toejam.

Q. Toejam what?

A. Toejam Creek, and that country up there.

Q. Did you make any particular examination of North's fence then? A. No, just noticed it.

Q. Just noticed it?

(Testimony of Mike Thornton.)

A. Yes, as I rode by. I have noticed it for years; it has been down for several years.

Q. Where has it been down?

A. Different places.

Q. Well, could you swear positively it has been down along the places shown upon the plat?

A. Yes, if I knew the places.

Q. That is, if you could identify the places with the plat, you could testify probably whether they had been down upon the places indicated upon the plat?

A. Yes.

Q. But not being able to identify the places with the places indicated upon the plat, or with the fence indicated upon the plat you are not able to state, are you?

Mr. DENMAN.—He has not stated he was not able to identify the places on the plat.

Mr. PLATT.—I thought he just said so.

Mr. DENMAN.—No.

WITNESS.—No, I could identify the places on the plat.

Mr. PLATT.—(Q.) You think you could identify them? A. Yes.

Q. Well, show the Court where they are.

A. That is, as I understand this plat, where the fence turns north. [558]

Q. Where the fence turns north, where is that?

A. At the southeast corner of the plat.

Q. You mean of North's fence? A. Yes.

Q. That is the extreme easterly corner?

Mr. DENMAN.—That is the southeasterly corner also?

(Testimony of Mike Thornton.)

A. Yes. The fence was down along in here, and down here for a quarter or half a mile.

Mr. PLATT.—(Q.) Down where?

A. Running north.

Q. Running north? A. Yes.

Q. North from this little arrow point near Opening No. 5?

A. Yes, it was either a quarter or half a mile down there.

Q. How much was down along this easterly section, or was when you saw it in April?

A. Probably 300 yards.

Q. Any more than that?

A. Another place there was a gap had been cut there for several years, I guess.

Q. We don't want any guessing.

A. I know it was cut when I was there.

Q. In April? A. Yes.

Q. What do you mean,—the wire was cut?

A. Yes, the wire was cut.

Q. How big a place was cut then?

A. Well, between two posts.

Q. Just between two posts? A. Yes.

Q. How many feet of wire was down in April along the section from where the fence begins to go north to this extreme eastern point, when you saw it?

A. Well, it was either a quarter or half a mile; I don't know the exact distance.

Q. There is quite a difference between a quarter and half a mile, isn't there?

A. I didn't pay much attention to it.

(Testimony of Mike Thornton.)

Q. You didn't pay much attention to it? [559]

A. I know it was down for quite a distance.

Q. Was it down for a long distance, and up again, and down for another long distance, or was it all down in one place?

A. Well, it would be up in places and down in places.

Q. Well, how big were these apertures where it was down?

A. Well, I could not tell you exactly the distance.

Q. Well, now, according to your recollection when you were there in April, you remember, don't you, that the fence was down in places? A. Yes.

Q. But you are not able to testify the width of the gaps or the width of the openings, are you?

A. No.

Q. Just have a general impression that the fence was down in places, is not that so?

A. Yes, I knew the fence was down.

Q. You would not want to testify in how many places it was down or what the dimensions of the aperture was, would you?

A. No, not the exact numbers.

Q. And you say that is based on what you saw in April or May? A. Yes.

Q. You don't know in how many places the fence was cut, do you?

A. No, just that one place, is all I remember.

Q. That was between two posts? A. Yes.

Q. As a matter of fact, you haven't a very distinct recollection have you, as to just what the condition

(Testimony of Mike Thornton.)

of that fence was?

A. Yes, I seen the fence all round, it is in bad shape.

Q. I mean as to the gaps, openings, and where it was cut?

A. No, except just what I have told you.

Q. Just a recollection from what you saw, namely, that the fence was down in places? A. Yes.

Q. But you would not want to testify as to the distance it was down? A. No. [560]

Q. Now, you don't know how the fence came down, do you, in places? A. No, sir.

Q. You don't know when it came down, do you?

A. No.

Mr. PLATT.—That is all.

Mr. DENMAN.—That is all. I would like to further cross-examine Mr. Flocker on his map, if the Court please. I don't think we will have any disagreement on it, but I would like to have him explain his notation.

[**Testimony of Ira M. Flocker.**]

IRA M. FLOCKER.

Mr. DENMAN.—(Q.) Mr. Flocker, your map here on the west side of Opening No. 6 shows the fence as turning up, does it not? A. Yes.

Q. That is to say, there is a corner as if the fence had been completed to that corner, and turned up?

A. Turned and ran as far as the stream in a north-erly direction.

Q. In other words, it does not indicate they were coming across to meet this fence on the other side?

(Testimony of Ira M. Flocker.)

A. No, sir.

Q. And those two "T" crosses are simply terminal lines? A. They indicate the opening.

Q. You didn't show that indication on any other place here, did you?

A. Some places I left it off, but this place, I didn't.

Mr. DENMAN.—That is all, your Honor, that is our case.

Mr. PLATT.—I don't think we have any rebuttal, if the Court please.

Testimony closed. [561]

I, A. F. Torreyson, Official Reporter of the United States District Court, in and for the District of Nevada, DO HEREBY CERTIFY,

That as such Official Reporter, I took verbatim shorthand notes of the testimony given and proceedings had in said court upon the trial of the case of The United States of America, Plaintiff, vs. Golconda Cattle Company, Defendant, No. 1166, and that the foregoing transcript, consisting of pages 2 to 561, both inclusive, contains a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on the trial of said case.

A. F. TORREYSON,
Official Reporter.

Subscribed and sworn to before me this 12th day of April, A. D. 1912.

[Seal]

T. J. EDWARDS,
Clerk of the U. S. District Court.

[Indorsed]: * * * Filed May 25, 1912. T. J. Edwards, Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Testimony.]

District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing 561 typewritten pages, in two volumes, is a true and correct copy of the testimony on file in my office, in the cause entitled *The United States of America, vs. Golconda Cattle Company*, the same being docket No. 1166.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 25th day of May, 1912.

[Seal]

T. J. EDWARDS,
Clerk.

[Endorsed]: No. 2143. United States Circuit Court of Appeals for the Ninth Circuit. *Golconda Cattle Company*, a Corporation, Appellant, vs. *The United States of America*, Appellee. Transcript of Testimony. (For Transcript of Record, see Other Volume.) Upon Appeal from the United States District Court for the District of Nevada.

Filed May 28, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GOLCONDA CATTLE COMPANY (a corporation),	} <i>Appellant,</i>
vs.	
THE UNITED STATES OF AMERICA,	} <i>Appellee.</i>

BRIEF OF APPELLANT ON REHEARING.

In our petition for rehearing we have set forth the misapprehensions of fact as to the location of the spaces between the fences in question here, and as to the purpose of the company in erecting them. Upon re-examination of the government's exhibit, we have discovered what we believe to be the cause of the court's error. The legend adopted by the draughtsman for a fence is a straight line, with nothing to distinguish it from the section lines. As a section line crosses many of the fourteen openings between the various fences of the company and of the other owners, the court probably failed to recognize all of them as openings. In any event, the effect of the mistakes of the opinion is to

leave a very unjust and unfair impression of *mala fides* on the part of the Golconda Cattle Company and those connected with its management, which we feel confident we may rely on the court's sense of fair play to correct.

As the court has seen fit to go behind the findings of the lower court, we have considered the facts in much fuller detail in this brief than in any of the others, and this may be regarded as a substitute for all of them, both as to the facts and the law.

The Golconda Cattle Company is a corporation engaged in farming and cattle raising in Squaw Valley, Nevada, and, incidentally, in converting its holdings of semi-arid sage brush lands into alfalfa and grain fields through the establishment of a large irrigation system. The lands in question in this suit are situated in the Squaw Valley region, in a mountainous country about fifty miles north of the Humboldt River, and in its watershed. They are at an elevation of from six to eight thousand feet.

Squaw Valley lies to the southwesterly of the confluence of two creeks, Rock Creek and Willow Creek, which flow to it from the higher mountain country to the northeasterly.

It must always be borne in mind that the government's map shows only about a fourth of the 40,000 acres of the company's holdings, the great body of its lands lying in Squaw Valley contiguous to the lands in blue at the westerly end of the map (Osborne, pp. 74, 228). The government map is cunningly contrived to show a thin blue chain of lands encircling a body

of government land. The fact is that the larger fields of the company, already reclaimed and in alfalfa, lie to the southwest, while the portion shown on the government map are but continuations of this main body, where the company, following the universal custom in semi-arid countries, has taken up the rich creek bottoms as far as they are cultivatable. The creek bottoms are but the fringes of a great alfalfa and grain ranch.

Rock Creek extends in a general northeasterly direction from the main body of the company's lands for about seven miles and then forks, its easterly branch, Tojam Creek, extending almost due easterly for seven miles further. Willow Creek extends almost easterly for eleven miles and then northerly to its northerly branch, Siawappe Creek, which flows northerly and rises within about two miles of Tojam Creek. The two creeks and their upper branches thus almost encircle a very considerable area of land.

As to the government land thus surrounded by the creeks the lower court finds, upon undisputable evidence, that:

"The government land is all rough and hilly; it has a general slope toward the southwest, as well as an inclination from the central high land toward Willow Creek on the south, and to Rock Creek and Tojam Creek on the north and west. It affords only a somewhat scant pasturage for about two months in the early spring."

Trans., p. 27.

"Inside the inclosure there are some 26,000 acres of government land and 11,000 acres of privately owned lands, nearly all of which belong to defendant. The 11,000 acres

are for the most part bottom lands, and almost completely surround the tract owned by the government.”

Trans., pp. 24, 25.

“Defendant’s bottom lands are undoubtedly more valuable than the government land which they inclose.”

Trans., p. 30.

The company has a large dam and reservoir on Willow Creek, which stows water for use on the lands on lower Willow Creek and in Squaw Valley below the confluence of Willow Creek and Rock Creek, for a radius of twenty miles, serving a territory to the westward, principally off this map, including the Lake and Mansion fields (Osborn, p. 188). The Frazer Creek Ranch adjoins to the west of Rock Creek (190).

It has also a dam site on Rock Creek, where the waters of that creek may be stowed. The acquisition of the creek bottoms is thus intimately connected with the irrigation system of the company.

There is no disagreement among any of the many witnesses in the case as to any of the facts concerning the arable quality of the creek bottoms, the rough and hilly character of the government land lying between the creeks, the scanty vegetation it produces and its general valuelessness for anything but its limited pasturage. The testimony is uncontradicted that this land could not be irrigated. There is not a line of testimony to support the theory that any of it was fit for farming. The finding of the lower court clearly establishes the contrary.

As is shown by the flow of the streams, the country rises to the northeast. As one comes into this higher territory good grazing land is found, the objective of cattle owners of that district for their summer feeding. The head waters of the two creeks mark the beginning of this higher grazing land and it extends from these head waters for some distance. All of the witnesses are agreed upon this and the deeply worn cattle trails towards and over this higher country are mute evidence of the customs of the cattle themselves.

It was the natural desire of the persons owning the creek bottom, up to the time they should be placed under cultivation, to steer their ranging cattle along and up the bottoms, where they would get the best grazing until that was exhausted, and then direct them into the higher territory beyond.

The operations of the Golconda Cattle Company, in fencing, clearing, planting and irrigating this great territory, had extended over a period of more than four years prior to the filing of this complaint on May 31, 1911. The alfalfa and grain fields to the west of the area shown on the map had been developed first, and the surveys and fencing of the lands at the joining of the creeks and then up the creek bottoms, had followed. The plan of the company was to fence and cultivate its fields one after another up the creek bottoms as the last part of its general scheme. Contrary to the impression received by the writer of the opinion heretofore filed in this case, a very large portion of the lands even on the creek bottoms shown on the map had been fenced, both on

the inside and the outside, and made into fields, prior to this suit and were then planted in alfalfa and grain. As to the remainder, the surveying had been completed for the fence on both the inside and outside of the company's lands, and the posts and wire bought over a year prior to the filing of the complaint (pp. 164, 167), and the remaining fences on the inside of the lands—that is toward the government lands—were under construction on a portion of the Willow Creek property at the time of the filing of the suit.

There is not a line of testimony in the entire record questioning the *bona fides* of the intent of the company to reclaim all its territory in the creek bottoms and plant the same to grain, alfalfa and vegetables. Its continuous similar development of its property to the westerly and southwesterly would have been a sufficient answer had the question of *bona fides* as to the creek bottoms been raised.

All this is borne out by the testimony of the witness Osborne who was called by the government and accepted by us. The court commented on the good faith of Osborne's testimony at page 195.

“Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an enclosure to the westerly, which inclosure is inclosed *on the east side* by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT. Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN. It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary."

Record, page 164.

"A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below 'Opening No. 1-150' is it?

A. Oh, that is the lane, it comes to the lane."

"Q. It comes to the lane, and forms the northern boundary of the lane in there?

A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary.

A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes.

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

* * * * *

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN. Q. How long ago did you get that wire?

A. Bought that wire about two years ago."

Page 165.

"Mr. DENMAN. Q. The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company."

Page 166.

“Q. What did you make it for?”

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble Field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys for that purpose?

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; *to fence both sides of their land*; I had orders from the Golconda Cattle Company to that effect.”

Pages 190-191.

“The COURT. You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN. Q. You had a surveyor in your employ, and had the corner posts set up for the fence along the *north line* of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had it resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT. Q. Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir. They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to alfalfa, that is on company's land below that red line.

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS. 10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know."

"Mr. DENMAN. Q. That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT. Q. Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the *first time we had them protected*, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, in the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911, that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch."

Record, pages 186, 187, 188.

"Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them *in* and *outside*, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences *on the inside*?

A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir."

Record, page 193.

It should be noted, though it is of minor importance, that the ownership of the Golconda Cattle Company does not extend over all of the land shown in blue on the government's map. All that large area thus colored on the northeasterly corner of the map and lying to the north of opening No. A, and to the east of the word "North's" in Section 36, belonged to other owners, and none of the fences on them were erected by the defendant.

The company was also engaged in the stock business, and it naturally desired, during the period of the development of its properties, and prior to completely fence-

ing them, to get the utmost good it could out of its rich creek bottoms. It hence placed its fences along the outside of these lands first before filling in the entire interior boundary line and completing the enclosures of the balance of the bottoms.

These enclosures along the outside of its property performed the double purpose of confining the cattle to the grassy bottoms and steering them, as they drifted from lower to higher territory in the spring time, according to the universal custom of cattle in arid countries, up toward the rich high mountainous feeding grounds beyond the head waters of the two creeks.

The uncontradicted testimony is:

“Mr. DENMAN. Q. What is this country beyond—is it a high mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is an open range.

Q. That is an open range in here, it is?

A. Yes.

Q. How about the condition of the feed between the point marked ‘Opening No. A’, and North’s fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks?

A. Certainly."

Record, pages 170, 171.

"Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. *One was to steer the cattle up to the mountain, and the other purpose was the company's intention of fencing their own lands."*

Record, pages 213, 214.

"Mr. PLATT. Q. Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out?

A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it?

A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is to keep it out, because that—

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. As I said before, the fence was built with the object of helping steer stuff up, and at the same time with the object of building the fence, was for the company to fence their lands.

Q. To steer stuff up where?

A. Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.

The COURT. Haven't we been over that already?

WITNESS. We have been over it time and again."

Record, pages 214, 215.

The great highway of the country is the Midas-Tuscarora road. It is the only road shown on the government map though two others were proved at the hearing, one passing through the lands in question, starting at opening No. 7, crossing the government land, and coming out from opening No. A, and going thence to the town of Tuscarora, and the other running from opening No. 7 to the Tie Corral country. The Midas-Tuscarora road enters the lands of the company at their western end, and is first shown on the map of the government at the point marked opening No. 1, of about 150 feet width. It there passes through a lane and on through the government lands for a distance of nearly two miles. It then re-enters the company's lands and passes up the Willow Creek bottom, continuing until about half a mile below the government reservoir, inside the company's fences. At this point it passes through the fence through an opening 100 feet wide, and continues along Willow Creek bottom, still on the company's land but outside its fence, until it reaches the southeasterly end of the territory, it passes on to the easterly.

Along the line of this county road at its easterly end, there is an opening 3400 feet long in the company's fences at a point where they cross a valley which is the natural gathering place of cattle coming up from the

Humboldt country to the south. The ranges from the south lead into this valley and the cattle, working northerly (in the spring), from the Humboldt bottoms, where they winter, would be naturally drawn there as a feeding ground and for the purpose of watering in Willow Creek. The witnesses are agreed that the natural direction for the cattle to range is northerly in the spring, returning in the fall. The opening at this point leads directly into the government land. It is within sight of the main high road and, in every way that an opening can be, is a direct invitation to both settler and cattle to enter upon the government lands in question. This opening is marked on the government's map at one place as half a mile wide, and at another as a quarter of a mile wide. The actual distance was measured by Surveyor Tilden, and the District Court found it to be 3400 feet on his testimony. Speaking of this opening, the court says:

“Gap No. 6 is about 3400 feet long, and is favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains.”

Record, page 26 (small volume).

This finding is based on the testimony of the witness, McClellan, offered by the government and accepted by the defendant.

“Mr. DENMAN. Q. Can you tell me through what portion of the country south of this general map here, the cattle coming from the south in the springtime would naturally pass in, working up to the higher country beyond; where would they come up?

“A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north,

principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast of the quarter section corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate?

A. That is a watering place.

* * * * *

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the spring-time with reference to direction of travel?

* * * * *

Mr. DENMAN. Q. The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north."

Record, pages 254, 255.

"Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here.

A. That is on the Willow Creek.

Q. Is there any Creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running out through 32, and back around past 31, surrounding that opening at that point?

- A. It is.
- Q. And that valley is a natural gathering place for cattle?
- A. The cattle drift into it from the south and the east.
- Q. There is a road coming there, isn't there?
- A. A road right by.
- Q. What road is that?
- A. Tuscarora road passes right by there.
- Q. Isn't there another road there also?
- A. Another road comes over the Tie Corral country.
- Q. How is 'Tie' spelled?
- A. Railroad ties, that is all the name I know it by.
- Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?
- A. Right in that spot.
- Q. And go through that opening?
- A. They could, or go around the blue country, either one."

Osborne, pages 175-176.

In considering the question of the accessibility of the government land to settlers, we regard these openings on the main highway of the country as paramount evidence, both on the question of actual physical accessibility and of the intent of the company not to exclude settlers and cattle therefrom.

Following the road as it enters the extreme westerly end of the land, it passes through an unobstructed lane 150 feet wide, directly on to the government lands. It then parallels the government land for five miles, over half of this distance with nothing between it and the government land lying less than a quarter of a mile to the northerly. It then passes out of the company's fences, through an unobstructed opening 100 feet wide, and along the outside of the company's fences, on past the 3400-foot opening at the easterly end. It is inconceivable that any settler could remotely dream, as he passed

along this road, two miles of it over the government land then some three miles with no obstruction between him and the government land and finding the opening of 3400 feet along the road as the most easterly point of access to the land, at a natural gathering place for cattle, that the Golconda Cattle Company intended the exclusive appropriation of the government land, or to prevent settlers entering there, or that he, the settler, could feel in the slightest way hindered or restrained from reaching the land in the interior.

As to the other road from below the reservoir to opening No. A, and thence to Tuscarora, this leaves the government land through an unobstructed opening 300 feet wide, after traversing a distance of six miles across the government land itself (Dorsey, p. 324). A third road coming over from the Tie Corral Country also passes the 3400 foot opening (Osborne, p. 176).

Besides the three openings where the roads enter and leave the government lands, and the large opening in the valley at the southeasterly corner of the territory and alongside the county road, the company left many other openings. All of these are at places of easy access and are themselves unobstructed. Commencing at the westerly side of the tract, at opening No. 1, the lower court correctly finds the next opening of 100 feet width, known as No. 3, to the northerly and at a distance of slightly over four miles. About the same distance further along the fence is another opening of 100 feet width, known as opening No. 4. From this to opening B, which is marked 500 feet on the government map

there are two and a half miles of fence. The company's fence ends $2\frac{5}{8}$ miles further to the east, at North's fence, at which point there is an opening 120 feet wide (Ex. A). North's fence continues for a distance of a mile and a half, in which there are five openings ranging from 90 feet to 312 feet in width. These openings are where the fence is down, wires broken and much of them coiled up (Lamb, p. 354).

From the end of North's fence to Nelson's fence is an opening of a mile and a quarter in an air line. The opening here is absolutely unobstructed. The government map makes it appear completely closed by a long snake-like looking object marked Toejam Mountain, which the government's legend calls Natural Barrier. Inspector Flocker, who drew the map, admitted on cross-examination that he had never been within a mile of this alleged barrier (p. 425), and that it would not stop cattle (p. 434). It was shown by every one of seven witnesses that it did not exist in the form and place described on the map and that there was no natural barrier even partially closing the mile and a quarter gap.

The government's witness, the surveyor, McClellan, tells us that instead of running in the general north-westerly and southeasterly directions, as it is drawn, to close the gap, it runs easterly and westerly and bears south of west.

McClellan says, at pages 256, 257 and 258:

“Mr. PLATT. Q. Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as 'Toejam Mountain' is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

* * * * *

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about *4 miles east of this country.*"

McClellan, pages 256, 257, 258.

Its true position is shown on defendant's map in evidence which is based on an actual survey of the land.

It fills less than a fifth of the space of the gap and is nearly a mile from it.

Defendant's Ex. "A"; Tilden, pages 446 to 466,
et seq.

A wagon could be driven over it (Thornton, p. 660). A survey showed that a railroad could be built on natural grade over the very place where the snake-like object appears (Tilden, pp. 549 to 569). Two disinterested witnesses, Mr. Lamb, the sheriff of the county, and Mr. Sheehan, the manager of the bank at Winnemucca, crossed the mile and a quarter gap at the northeast corner shortly before the trial. They identified all the places in the fences on the government map. Both testified that the 1¼ mile opening had easy grazing ground on both sides, with abundant summer feed. Neither *could find the barrier across opening 5 described in the government map as Toejam Mountain.*

Sheehan, page 491;

Lamb, page 335.

Osborne describes the territory as follows:

"Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain.

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening out into the country beyond?

A. Yes."

Osborne, p. 170.

It is most significant in view of the testimony of all these witnesses of reputation and standing and the production of an actual survey of the land, that Melrose, the other government inspector, was not asked any questions to support the theory of the government, as shown by its map, concerning this alleged natural barrier. The government offered no evidence to contradict the defendant's unanimous testimony that this higher country at the northeast corner of the territory in question was the natural summer feeding ground where the stockmen desired their cattle to go as the lower country feed was exhausted.

How unfair to the defendant is the attempt of the opinion to show that the higher country to the northeast merely completed, with the fences, a barrier to the government land, whereas in fact the fences acted as an aid to get the cattle *up to* this higher land which was the objective in summer of all the cattle of that vicinity. The fences were for the purpose of getting the cattle *through* gap No. 5, not to stop them at that point.

Continuing on down to the southerly, we come to opening No. A, 300 feet wide, and having a creek on one

side and a spring on the other (Petrie, p. 624), a natural gathering place for cattle to enter or leave the government territory, with water on both sides of the opening.

Further to the south is the 3400-foot opening alongside the Midas-Tuscarora road which we have described above.

Continuing to the westerly a distance of about four miles, we come to opening No. 7, 100 feet wide, through which the two roads enter.

The next opening, $5\frac{3}{8}$ miles to the west, is 100 feet in width and the next, about three miles to the westerly, opening No. 1, at which we began.

Each one of these openings, the uncondradicted testimony shows, was at a place of free access, and was unobstructed. The greatest distance cattle would have to travel in any event would be about $2\frac{1}{2}$ miles to reach an opening, that is to say, it would not be greater in any event than half the distance between any two openings. As the fences the cattle would first encounter were along the outer side of a rich bottom country, cattle from the outside would naturally follow the fence, over well defined cattle trails, until an opening was found through which they could reach the bottom. Once through, the majority of them would follow the natural tendency of cattle to stray along the bottoms and thence up toward the higher feeding grounds.

It is true that these openings would permit the company's cattle to wander off the bottom lands into the

hills on each side but, as the tendency of the cattle is to follow up the bottoms and as the openings are at considerable distances apart, the fences would minimize the straying of the cattle. Of course where we had enclosed our lands with entirety in the bottoms the cattle of strangers could not feed upon them. This is hardly a matter about which the government, which has sold us the lands, can make a complaint.

So much for the topography of the country, the fences and the roads. A territory which can be reached through one space a mile and a quarter wide, one space 3400 feet wide, and twelve others from 100 to 300 feet wide, all unobstructed and all accessible, and having two open roads crossing it, and a third leading to one of its largest openings, is not *prima facie* enclosed so as either to shut out or shut in cattle or settlers, or intimidate anyone.

As we might have expected, there is not a line of testimony or an intimation that any settler was obstructed, impeded or restrained by any of these fences. Settlers passing through this mountainous region would naturally follow the general highways which, as we have shown, would have taken them directly on to the Government land. It is not conceivable that they would have gone into the country without consulting at one or another of the neighboring towns and learning that the road led directly through this territory, if that had been their objective. If they had gone across country from any other direction, they would have come to the company's lands and found its fences, and learned that

they would have a neighbor. Certainly they would expect to fence their own lands and could not complain of this. Had they followed down their future neighbor's land, they would have found, within a distance of not more than two and a half miles in one direction or the other, an opening leading to the Government land beyond. Two and a half miles do not seem a distance to distress any settler after coming all that way to find this promised land which the court describes (p. 27) as "rough and hilly", "affording only a somewhat scant pasturage for about two months in the early spring".

Likewise there is not a line of testimony showing that any cattle were kept from the government territory by the fences on these private lands of the company. Contrary to the government's contention of an exclusive user by the company, it appears and the lower court found that the neighboring stockmen have often grazed on the land in question since the fences were erected and that in 1910, over 200,000 sheep were driven from the southwest to the northeast across appellee's land. This finding is based on the testimony of the stockmen themselves, and the evidence of the different brands, over eight in number, some coming from ranches over sixty miles away (169, 655, 656).

Having thus shown the physical conditions prevailing and the intent of the company in fencing its own lands, we will now consider the questions (1) Whether Congress intended that such a fencing of one's own land constitutes an enclosure within the meaning of the act, and (2) Whether Congress has the power to take from

the defendant without compensation the twenty odd lanes of its land necessary to give the twenty places of convenient access to the government land beyond.

II.

DO THE FENCES ON DEFENDANT'S PRIVATE LANDS, WITH THEIR FOURTEEN OPENINGS AND TWO CROSSING ROADS AND A THIRD PASSING BY, CONSTITUTE AN ENCLOSURE WITHIN THE MEANING OF SECTIONS 1 AND 2 OF THE ACT OF 1885?

The lower court, after fairly describing the openings, though failing to note that the 3400-foot gap was alongside the county road, says:

“While defendant has undoubtedly sought to keep within the law, I am satisfied that the openings on the north, west and south are not sufficient under present conditions to afford reasonable and proper access to the land in question. Most of the gaps, particularly the long one, are at and toward the east end of the field. Those on the west and south are insufficient, under present conditions.”

Transcript of Record (small volume), p. 30.

The question then is, Does a series of fences which are sufficiently open on the easterly end by gaps a mile and a quarter and 3400 feet long, respectively, at their northeasterly and southeasterly boundaries, become an *enclosure* because on the other sides the openings across defendant's private lands, though free and unobstructed, may cause an inconvenience of travelling a distance of not over two and a half miles to reach them? Or, in other words,

Does a body of land become *enclosed* within the meaning of the act when it is accessible by fourteen openings and two crossing roads because if there were more openings across the surrounding private lands, it would be more convenient for the public? Or, in other words,

Must a person whose lands, with others, surround government land, open up rights of way across his own land to the *convenience* of the public, or is the criterion of the statute whether there be a sufficient number of openings so that it cannot be said that the public are excluded from reaching the land?

If Congress intended convenience of accessibility to be paramount to the right of private ownership, then there is a vast territory enclosed in violation of the act by the Western Pacific and Central Pacific Railways in the Humboldt Valley, Nevada. These roads cross each other and diverge and approach till they are a very short distance apart. They are fenced over a large portion of their right of way and for long distances neither has an opening anywhere near as large as 3400 feet, save in the towns, where cattle would not travel. And yet would anyone for a moment contend that the fences of these two roads constitute an enclosing of the public land within the meaning of the act, because a settler or a ranging steer would have to travel five miles to find an opening across the track and, when he found it, it was only 30 feet wide? Have Mr. Harriman and the gentlemen of the Gould family been guilty of a misdemeanor in maintaining such railway fences?

It is of no avail for the lower court to discuss the efficiency of a single 20-foot opening in forty miles of fence as changing the nature of an enclosure, for it offers no analogy to the case at bar. Here the openings are on every side. On the west, south, southeast and east openings 1, 7, 6 and A (Ex. 1) are next to or actually admit the only highways the country is shown to have. On the northeast for a mile and a quarter, the opening carries the many cattle trails into the higher summer range beyond.

What the lower court has decided is that a series of fences with numerous gaps between them, which certainly will neither hold cattle in nor out, and which gives free access to settlers at all travelled roads and a dozen places besides, is an enclosure because at other places, in protecting the private land they were built to enclose, it is an *inconvenience* to travel to the next opening. It has in effect decided that any fencing of private lands which it is an inconvenience to go round is an enclosure within the meaning of the act.

This act has been before the courts since the decision of *Camfield v. United States* in 1897, and in no case has it even been intimated that the criterion for determining the existence of an enclosure is mere convenience of accessibility from all sides. *In no case has it been held that there was an enclosure where there has been a single accessible and convenient opening.*

One of the most significant of the opinions is that given by Judge Gilbert, speaking for this court, in *Thomas v. United States*, 136 Fed., at 159, a decision relied upon by Judge Hunt as showing the nature of

an enclosure in violation of the act. In that case over 50,000 acres had been enclosed, and at least thirty miles of fencing built. It was contended that in this long line of fence there were two openings, one of three-quarters of a mile, where a canon intervenes, and another at a lake which at low water in the late summer would permit the passage of cattle. Instead of holding that two openings in a fence thirty miles long would be insufficient in any event, the court enters into a consideration of the accessibility of the openings and holds that they were a mere sham. It is clearly apparent from the *ratio decidendi* that if they had been fair openings, or either had been, the court would not have held that there was an enclosure. Judge Gilbert says:

“It is shown, also, that there is a gap of three-quarters of a mile in the fence at a point where a canon intervenes. It is admitted that the canon is impassable at that point; but it is said that cattle, by going three miles down the banks of the canon, can enter the canon, and then by going up the canon, can get within the inclosure. It is not shown how far they would have to proceed within the inclosure before they could emerge from the canon. It is absurd to say that this is an opening in the inclosure. It was evidently left unfenced because it could not be fenced, and because it was deemed unnecessary to make other provision against cattle entering through the canon. Nor can the appellant maintain that his inclosure is not complete by showing that by the 1st of September in each year cattle may, if they possess sufficient intelligence or are driven there, go around the ends of the fences which extend into the lake. There is no evidence that cattle or stock of any kind ever entered the inclosure through these so-called open-

ings. The whole contention *that there are openings in the inclosure, and that therefore the appellant is not amenable to the law*, is so plainly without merit as to require no further discussion.”

Thomas v. United States, 136 Fed. 159, at 161.

In our case there were openings between the fences on all sides, unobstructed and at accessible places—fourteen of them, four alongside three different roads—one 3400 feet long, one a mile and a quarter long. There is abundant evidence that cattle of many brands from as far as sixty miles away entered through them on to the government land.

It is apparent that Judge Hunt believed that he had brought this case under the reasoning of the *Thomas* case when he found (opinion, p. 13) with such particularity (though erroneously) that the 3400 foot opening, instead of being in a gentle valley alongside the Midas-Tuscarora and the Tie Corral roads, is hidden away “at the foot of a mountain where the country is rough”, and which can be reached by the settler only “if he follows along miles of fence and turns in and goes over the rocky place”. He would also have been within the *Thomas* case if it had been true that the opening of a mile and a quarter at the northeast end, instead of being free and unobstructed and full of cattle trails, was almost closed by North’s fence which, though down in places, still had its wires on the ground* (opinion, p. 13).

* The error in the opinion was undoubtedly due to the fact that on the government map a straight section line crosses the opening which, according to the legend, also denotes a fence.

It would also have been a reprehensible sham within the Thomas case if the openings in the North fence, which in fact was in another place, had been crossed with wires on the ground (opinion, p. 13), instead of the wires being rolled up (as they in fact were), and we had represented this to the court as affording adequate access.

The opinion might also have been within the Thomas case if all these openings had been mere inaccessible shams and the eleven others had been too "narrow" (opinion, p. 13) for cattle or teams to enter, instead of all of them being as large (100 feet) or larger (up to 300 feet) than the size ordered by the lower court, and three with wagon roads running through them.

It is manifest that Judge Hunt would not spend his time in describing the inaccessibility of these openings and the obstructions in them if it made the fencing none the less an enclosure had they been at accessible places and unobstructed. We take it that the *ratio decidendi* of the opinion against us based on the erroneous findings of fact, compels a decree in our favor when the facts are found as the undisputed testimony shows them to be.

In *Homer v. United States*, 185 Fed. 741, a case we treat further under the question of intent, it is squarely held that *one* opening in a fence twenty-five miles long makes it unobjectionable under the section of the act invoked here. And this is not determined in passing on the condition of the fence at the time of the filing of the suit, for the court finds a complete inclosure, but by the

order of the court itself in opening up the inclosure. In this case there was an outside fence on the defendant's land which also enclosed two parcels of government land inside defendant's. Each of the government's pieces was surrounded by a separate fence on the boundary line between the government and defendant. The inside fences were ordered abated, thus leaving the entire tract surrounded by the single twenty-five mile fence. The court ordered:

“That such *an* opening should be made in the general enclosure as will allow free ingress and egress to the public lands in question.”

Homer v. United States, 185 Fed. 741 at 747.

“Free ingress and egress” is then to be had through one opening in a fence twenty-five miles long. Free access from all sides, the apparent criterion of the District Judge in this case, is not even discussed by the court. It is clearly apparent that if the fence in the Homer case had had a 3400 foot gap in a valley alongside two highways, with two roads crossing the government land through unobstructed openings and with eleven other unobstructed openings, ranging in width from a mile and a quarter to 100 feet, the court would not have held that it was an enclosure.

In *United States v. Johnston*, 172 Fed. 635, there were but two inaccessible openings, filled with brush, in many miles of fence around government land. Greater inconvenience or inaccessibility could not be imagined than that found by the court, short of having no openings at

all. Far from making convenience its criterion, Judge de Haven squarely holds:

“That the fence described (as above) does not constitute an unlawful enclosure of public lands within the meaning of section 1 of the act.”

United States v. Johnston, 172 Fed. 635.

We therefore submit that if a series of fences have a number of convenient and accessible openings at all the places of general travel and many others on all sides of the territory in question, it does not become an enclosure because at some places the fences built to protect private land may possibly cause the inconvenience of traveling to the next opening.

THIS COURT'S REVERSAL OF ITS POSITION AS TO INTENT.

Four judges in this circuit have given opinions or instructions making *intent* the criterion in determining whether a fence enclosing in private land violates Section 1 of the Act of 1885 by enclosing government land or Section 3 by obstructing access to it. These four judges are Judges Ross, Morrow, De Haven and Wolverton. Two other judges have concurred in one or another of these opinions—Judges Gilbert and Hanford.

The most striking case is the recent one of *Hanley v. The United States*, 186 Fed. 711, known as the Harney Valley case. The question as to what constituted an enclosure was directly before this court, Judge Ross in opening his opinion saying:

“The plaintiff in error was defendant in the court below to an indictment containing two counts, the first of which charged him with unlawfully maintaining and controlling certain fences, which, together with natural barriers and cross-fences, inclosed a large body of public land of the United States situated in Harney County, State of Oregon.”

Hanley v. United States, 186 Fed. 711.

Judge Ross then restates the rule in the *Camfield* case coupling it with the *Potts* case in which intent is the sole criterion, as follows:

“Any person may lawfully fence or otherwise inclose his own land, and may connect his fence or inclosure with that of an adjoining landowner, provided he does so in good faith. When, however, under the guise of inclosing his own land, he constructs or maintains such a fence or inclosure for the purpose and with the intention of inclosing public lands of the government, the act is unlawful. *Camfield v. United States*, 167 U. S. 528; 42 L. Ed. 260; *Potts v. United States*, 114 Fed. 52.”

The opinion then considers the instruction of Judge Wolverton in the trial in the lower court in which intent is squarely made the criterion to determine whether a fence without any openings in it at all, which crosses all the county roads and leave gates in only some of them, is in fact an enclosure within the intent of the act. Judge Wolverton’s instruction set forth in Judge Ross’ opinion was in part as follows:

“ * * * The intent or purpose with which fencing or an inclosure was constructed or maintained, if so constructed or maintained, may be gathered from all the testimony showing the local conditions

and environment, the ownership or want of ownership of the lands affected by the inclosure, their occupancy, and the use of which they are susceptible. Men do not build fences or construct or maintain inclosures except for a purpose. That purpose is usually manifest * * *

“A person has a right under the law, to erect fences wholly upon his own land, and to maintain them if he so desires, *and if incidentally such fences may obstruct or impede the ingress or egress of stock ranging upon the public lands, or the free passage of persons upon or over such lands, no one can complain*, because a man has a right to do what he pleases with his own, so long as he does no willful injury to another. But he cannot make the construction of fencing upon his own lands a *subterfuge* for inclosing or preventing free passage upon the public lands * * *

“You are the judges of the *purpose* for which this fencing was constructed in the first place, whether to inclose public lands or not; and, if so, whether it was maintained by the defendant as alleged in the indictment, and, if so, for what *purpose*.”

Hanley v. United States, 186 Fed. 711 at 713, 714.

Passing on this instruction Judge Ross says “this seems to state the law fairly in respect to the point there referred to”. That is to say it is the law that one may “incidentally obstruct or impede the ingress or egress of stock ranging over the public lands, or the free passage of persons upon or over such lands” if the fence is primarily built to protect his own lands. It is only when the fence becomes a “subterfuge for inclosing or preventing free passage upon the public lands” that it becomes unlawful. It is for the jury to

decide “the *purpose* for which the fencing was constructed” and to determine “for what purpose”.

Could there be a clearer or more unequivocal statement of the law? Could it be said that Judges Gilbert and Hanford were deluded by any obscurity of the opinion in giving their concurrence?

The Potts case on which Judge Ross relies in the Harney Valley case is also a decision by this court. Judge Morrow wrote the opinion, Judges Gilbert and Ross concurring. That was a prosecution involving the third section of the act, and the question was whether the intent of the defendant in maintaining a fence which, though enclosing the defendant’s land, unquestionably shut off access from the county road to the government land was a determining factor in the case. The facts offer an interesting contrast to the case at bar where the roads enter and leave the land though unobstructed openings and large gaps were left near the roads for the deliberate purpose of affording access.

The instruction of the lower court which this court held erroneous read in part as follows:

“The law is broad in its terms, and it is intended to prohibit any manner of inclosing the public domain by a person or a company or a corporation that has no color of title or right to have the exclusive use of it. The inclosure by a fence, or a combination of fences, or joining of fences that is wholly upon the land which the person does own, is unlawful, if in effect it does inclose and shut out the public from any part of the public domain. A man has no right to build a fence upon his own land, that connects with another fence, that is so

connected as to form an inclosure of public land, and shut the public out, or prevent their passage over the public lands.”

Potts v. United States, 114 Fed. 52 at 54.

Commenting on this Judge Morrow says:

“By a well-known rule of construction the words ‘or any other unlawful means,’ in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words ‘fencing’ and ‘inclosing’, so that those words must be read as ‘unlawful fencing’ and ‘unlawful inclosing.’ In other words, the ‘fencing’ or ‘inclosing’ of land does not become unlawful merely because either of these acts prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on a tract of the public land subject to settlement or entry under the public land laws of the United States. The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the *guise* of inclosing his own land, a person builds a fence *for the purpose and with the intention of inclosing the public lands of the government, that the fence or inclosure becomes unlawful.* * * *

“The fence of the defendant, connecting with the fences of other owners, had formed a chain of fences which presented a barrier between the public lands in question and the county road. It is evident that this portion of the country is not well populated, and that public roads are few, as the greater part of the public lands claimed to be unlawfully enclosed by the fence in question is two miles from the county road. Upon this evidence it was clearly the duty of the court to submit to the jury the question whether the defendant’s fence or inclosure *was erected by him in good faith to in-*

close his own lands, or whether, in joining his fence to that of others, it was his intent and purpose to prevent or obstruct any person from peaceably entering upon, or establishing a settlement, or residence upon, the tract of public land described in the indictment.

“This the court did not do, but instructed the jury that a fence built by a person upon his own land was unlawful, if in effect it inclosed and shut out the public from any part of the public domain. This instruction, as a statement of the law upon the subject, was too broad, and was therefore subject to objection.”

Potts v. United States, 114 Fed. 52 at 54 and 55.

In *United States v. Johnston*, Judge De Haven holds that a fence which was practically an enclosure was not unlawful because:

“Second. The lands described in the complaint as belonging to the United States are of little value, and the main purpose for which the defendant maintains the fence described in finding No. 1 is to keep stock belonging to other persons from straying upon the land owned by him and to keep his own stock upon said lands, although all of the public lands described in the complaint lying between said fence and the ranges of mountains on the north and east with which said fence connects are used by the defendant as a range for his cattle in connection with the lands owned by him.

“Third. The defendant does not assert any claim or title to the public lands described in the complaint, and the fence, mentioned in finding No. 1, is maintained by him because by so doing he is enabled to sufficiently inclose the lands owned by him to keep his own stock on, and the stock of others off of, said lands at less cost and expense to

him than would be required to inclose his lands on all sides by an artificial fence.”

United States v. Johnston, 172 Fed. 635 at 636 and 637.

Could any court have put itself more clearly of record as to the paramount importance of intent in these cases than this Court of Appeals of the Ninth Circuit? And yet we have these opinions of Judges Ross, Morrow, De Haven and Wolverton treated as mere idle words in an opinion which squarely holds that intent has nothing to do with it, and that a fence violates the section of the act against inclosing if it even inconvenience those desiring access no matter how necessary it may be to protect the defendant's lands.

Both Judges Ross and Morrow rely upon *Camfield v. United States*, 169 U. S. 518, for their interpretation of the act as making unlawful those obstructions which, under the guise of protecting private rights, are in fact intended to accomplish an exclusive appropriation of public land and to exclude others therefrom.

The *Camfield* case came up from the 8th Circuit where the Circuit Court of Appeals held that intent played no part once an inclosure of government land was shown. The opinion is about three-quarters of a page long.

On appeal the Supreme Court gives pages to the exposition of the bad faith of defendant in erecting a fence that would not aid in inclosing much of the private land of defendant and obviously was erected to make an exclusive appropriation of the government

land. Not only that, but it goes into the history of the legislation and finds precedent for the congressional act in a statute of the State of Massachusetts making a fence on a man's own land a nuisance if "*maliciously* erected or maintained for the purpose of annoying the owners or occupants of adjoining lands".

Speaking of the history of the legislation Mr. Justice Brown says:

"But the injustice of the prevailing doctrine upon this subject, in its practical operation, became so manifest that, in 1887, the legislature of Massachusetts passed a statute declaring that any fence 'unnecessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property', should be deemed a private nuisance, and that any such owner or occupant who was thereby injured in his comfort, or in the quiet enjoyment of his estate, might have an action of tort for the damage. The constitutionality of this statute was attacked in the case of *Rideout v. Knox*, 148 Mass. 368 (2 L. R. A. 81), but upon full consideration, the supreme judicial court was of opinion that the statute was within the limits of the police power, and was constitutional; and, although the fence was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit, beyond which it was not lawful to go. The court also held the statute to be constitutional with reference to fences already in existence when the act was passed; that although it involved, to a certain extent, the taking of property without compensation, yet, 'having regard to the smallness of the injury, and the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also

to the fact that police regulations may limit the use of property in ways which greatly diminish its value', the court was of opinion that the act was constitutional to the full extent of its provisions."

Camfield v. United States, 167 U. S. 518 at 523 and 524.

Seeking its justification in an act which makes the unlawfulness consist in "malicious intent" to annoy a neighbor and in the "malevolent purposes" of the fence, the court goes on through page after page to comment on the sham and *mala fides* of the defendant, saying:

"The device to which defendants resorted certainly was an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd numbered section, there can be no objection to them; but so far as they were erected immediately outside the even numbered sections, they are manifestly intended to enclose government land. Considering the *obvious purpose* of this structure and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve entry upon the lands of a private individual (p. 525).

* * * * *

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting

away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, *regardless of any detriment to his neighbors*, but when, *under the guise of enclosing his own land*, he builds a fence which is useless for that PURPOSE, and can only have been INTENDED to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large." (pp. 527, 528.)

Camfield v. United States, 167 U. S. 518 at 525, 527, 528.

Can it be possible that the Supreme Court meant, after all this discussion, that no matter how honest an intent a man may have had in enclosing his own land, and how entirely free he might be from a desire to make an appropriation of the government land accidentally enclosed by his fences, intent was no defense? Certainly Judges Ross, Morrow, Gilbert and Hanford did not so understand the *Camfield* case in invoking it in the *Potts* and *Harney Valley* cases in which the intent was held to control.

The Eighth Circuit, in *Homer v. United States*, 185 Fed. 741, holds to its earlier position that intent has nothing to do with the violation of the act. Judge Van Devanter vigorously dissents from the majority opinion, relying on the portions we have cited from the *Camfield* case and *Potts v. United States*. As the *Harney Valley* case was not decided till two months later than the *Homer* case, Judge Van Devanter did not have this latest expression of the Ninth Circuit,

and, up to this case, of all the circuits, to add to his authority.

It is submitted that the Ninth Circuit is right and that their opinions and Judge Van Devanter's dissent in the Eighth Circuit correctly state the law as it really is—namely, that where, as here, the good faith of the defendant is shown by his large openings near the travelled roads, and numerous others on all sides, and when the lower court finds that he really intended the fences to protect his own lands, no enclosure has been made in violation of the act.

III.

THE GRANTING OF TWENTY RIGHTS OF WAY ACROSS THE GRAIN AND ALFALFA FIELDS IN PROCESS OF DEVELOPMENT, AND THE CONSEQUENT NECESSITY FOR FENCING THESE RIGHTS OF WAY IS A TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE NEVER INTENDED BY CONGRESS AND PROHIBITED BY THE CONSTITUTION.

We have before shown that practically every acre in the bottoms belonging to the defendant is rich arable land. It is not disputed that a large portion of this area was already under cultivation and that the building of the remaining inside fences was actually in process when this suit was begun. The effect of the court's decree therefore must be considered with a view to the immediate use to which the lands were to be put. That is to say, as we are entitled to enclose our lands on all sides, and as we were engaged in doing so at the time the suit was commenced, the court has

no more right to cause us to make additional openings in the uncompleted fences on the one side of the lands than it would have if the fence were on all sides of the land.

The decree requires twenty openings in the fence, of a hundred feet in width, so placed that there are required thirteen in addition to the thirteen now existing. It is apparent this means that unless these openings are fenced clear through from the outside to the inside of the company's lands, they will admit everyone's cattle to the grain, alfalfa, or potato fields of the defendant. Now this effect of the decree must be construed as well as its mere words, in determining whether it is warranted by the law. The question is, can the court, in the guise of abating fences on private land, having all the many accessible and unobstructed openings we have before described, require the owner to surrender thirteen additional strips of land 100 feet wide and from a quarter of a mile to a mile and a half across its cultivated lands, to make the access of straying cattle more "convenient"?

The continuity of these fields of alfalfa for purposes of grazing is entirely destroyed. No field can be more than a mile and a half long, an absurd limitation when one considers the universal practice of handling cattle in large numbers. If one is to use the stubble of the grain after harvest a very large number of herdsmen must be kept to hold the cattle as they range from one field to another across the right of way to the government land. Of course these men, two for each right of

way, could be used to hurry the straying cattle of strangers across the rich bottoms of the defendant, but it is apparent that such a cost, not less than \$80 per month for each right of way, or \$1600 per month for the 20 strips ordered by the court, is prohibitive.

It is obvious that this is an invasion of property rights, and could be justifiable, if at all, only under the police power. Otherwise it would involve the taking of private property without due process of law. And in any event, it would constitute the taking of private property (in the present case the lanes themselves, one hundred feet wide and, in some cases, over a mile long, would amount to many acres) for public use, without compensation. Appellant is forced to dedicate roadways apparently of considerable value across rich agricultural lands to the public use, without one cent being returned to it, and this is in addition to many free means of access already gratuitously afforded. This feature, we submit, seems not to have been considered in the case of *Homer v. United States*, even in the dissenting opinion of Mr. Justice Van Devanter (then Circuit Judge), and was not involved in the case of *Camfield v. United States*. But from the latter case a few quotations are enlightening upon this, and other points, showing how the Supreme Court would have distinguished that case from the one here under consideration.

* * * * *

“There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the maxim ‘sic utere tuo ut alienum

non laedas'. His right to erect what he pleases on his own land will not justify him in maintaining a nuisance." (page 522.)

* * * * *

"The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd numbered section, there can be no objection to them; but so far as they were erected immediately outside the even numbered sections, they are manifestly intended to enclose government land. Considering the obvious purpose of this structure and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve entry upon the lands of a private individual." (page 525.)

* * * * *

"Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured, may not still be pursued, providing herdsmen be employed or other means adopted by which the fencing in and exclusive appropriation of such land shall be avoided." (page 527.)

* * * * *

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive

enjoyment of it, regardless of any detriment to his neighbor, but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large." (pages 527, 528.)

From this it appears that the Camfield case was decided upon the ground that these fences erected to effect a purpresture and for no other purposes, were a *nuisance*, and as such should be *abated*.

In addition to the fact that the Camfield case presented an outrageous appropriation of government land, it appears that the reasons why the court denominated the fence a nuisance, and so was justified in a nominal invasion of property rights, were as follows:

1. It constituted a use of one's own property for the sole purpose of obstructing another (the government) in the enjoyment of its property, and of appropriating that property.

2. It accomplished this malevolent purpose.

3. The public had the right to be secured, by abatement of the fence, in its property right to use of the government land *so long as the defendant* (Camfield) *was not deprived of his right to protect in good faith his own property from trespass*. This latter is the uncontrovertible conclusion from the remarks of the court, at page 527, affirming his right to fence each section belonging to him, even if by so doing he incidentally cut off access to the government land.

Upon these grounds, and upon these only, could the court denominate the fence a nuisance, and even then it must be admitted that the term was as generously used as possible.

But in the present case we have a totally different situation. 1. Here the purpose was bona fide protection of appellant's own property. 2. The result accomplished was the legitimate protection of its property. Even had there been exclusion, which there was not, it would have been the exclusion expressly permitted by the opinion in the Camfield case. 3. The abatement of the fence in the Camfield case worked no injury, nor even harm, to Camfield, nor did it purport to donate a right of way to the public across Camfield's land. In the present case, large quantities of appellant's land are taken from it and given to the public, and it is absolutely inhibited from the exercise of the fundamental right of all property—the right to protect from trespass.

We have called attention to the importance which is given to the *intent* in both the Camfield and Potts cases. It is quite apparently a *sine qua non* of the nuisance in each case. We are not called upon to consider whether this is the more general rule in the case of nuisances, though the Massachusetts cases cited by the Supreme Court, and upon which it, to a large extent, bases its opinion, are founded upon a statute which makes malice an element of the class of nuisances there inhibited.

When we turn to the present case, however, we find complete absolution in the trial court from any intent either to inclose or to appropriate.

Assuredly the doctrine of nuisances invoked with excellent justice in the *Camfield* case has no application here.

Primarily

“a fair test as to whether * * * a particular use of property constitutes a nuisance is the reasonableness or unreasonableness of the * * * making use of the property complained of in the peculiar locality and in the manner and under the circumstances of the case, and where the use made of his property by the person complained of is not unreasonable, it will not, as a rule, be enjoined, nor can a person complaining thereof recover damages.”

29 Cyc., 1156-1157, and cases cited.

As has been seen, it was exactly upon this reasoning, and after a determination that the use of the fences there involved was to accomplish a purpresture, that the Supreme Court declared the *Camfield* fence a nuisance.

Again, to constitute an abatable nuisance, somebody must have been not only damaged, but also injured. (*Tiedeman, Limitation of Police Power*, sec. 122a. *First National Bank v. Sarlles* (Ind.), 28 N. E. 434.) It cannot be contended that, however broad the right to graze cattle upon the public domain may be there is any *right* on the part of any private person to trespass upon the private land of another, unless the right of the second person to protect his land has been taken away from him by due process of law.

Now the police power takes its vitality from the “over-riding” necessity of the public health, comfort or welfare, and is not to be invoked, at least to the detriment of constitutional guaranties, unless there is no

other feasible method by which the public health, comfort or welfare may be preserved. "Under the pretense of prescribing a police regulation", says Mr. Justice Field, in the "*Slaughter House Cases*", 16 Wall. 36-87, "the state cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgement". "An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands", says *Tiedeman on the Limitation of Police Power*, sec. 122, "is a taking of private property without due process of law, which is inhibited by the constitution".

It is certainly true in the present case that the *fence* is not the real nuisance, nor a cause of injury, but that the inconvenience and annoyance to the government and to the public (always supposing that no means of access to the public domain had been provided) *resulted solely from the rights of the appellant to the exclusive enjoyment of its own land* and from any method which it might adopt in a *bona fide* effort to protect these rights. To abate the fence alone can avail the government nothing, since the owner still has the right to keep strangers from grazing across his land. Abatement is of no value *unless in conjunction with such abatement it can appropriate without compensation large areas of private property and deprive the owner of the exclusive use thereof.*

Ordinarily it is only by the exercise of eminent domain that private property may be appropriated to public use, and it is only in cases of "great emergency, engendering overruling necessity", that the police power

may justify a taking of private property without just compensation. Otherwise the property must be purchased. *Yates v. Milwaukee*, 10 Wall. 497. The police power itself must be exercised in subordination to the constitution. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

The following is quoted from *Hollingsworth v. Parish of Texas*, 17 Fed. 109, at 113, 114:

“In Louisiana, as well as in all the states, the implied powers are sufficient to warrant the imposition of this service on lands adjacent to navigable rivers, and the imposition of such service may be the offspring of a wise public policy; but does it follow that there is, in the state or federal system, any power outside of and apart from the eminent domain right to lawfully, by direct or implied legislation, take any private property, or take the use of it, or so damage it as to deprive the owner of its use or profits, with or without compensation?

“The United States Supreme Court, in 6 How. 532, says:

“That in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large * * * This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government * * * and must yield, in every instance, to its proper exercise * * * In fact, the whole policy of the country relative to roads, mills, bridges, and canals rests upon this single power, under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed.’

“The same court, discussing the same principles (91 U. S. 367):

“No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. * * * The right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law.’

“It is observable that the right of eminent domain and the police power, though well recognized attributes of political sovereignty, are distinctive in the purpose and extent for which the legislature may exercise them, and neither is ever free from the restraints or limitations of the fundamental laws. Laws passed under a proper exercise of these respective powers have often been considered by the federal courts, and their distinctive purposes and application recognized. To some extent these courts differ as to the basis of the eminent domain right, some of the decisions citing the power as resting on political necessity; some on the tenure of lands and implied compact; but I think no federal authority can be cited as a precedent for taking or appropriating the use and control of private property under any other power, expressed or implied, than ‘this single principle’ of eminent domain, upon which it is well known that the policy of the country in relation to public works rests in one state as well as in another. 6 *How*. 532.

“These courts have uniformly held that the police power is a different ‘prerogative power’, and extends only to regulating the owner’s use and dominion of private property, not to taking from him or dispossessing him of its use and control.

“ * * * Dillon, *Mun. Corp.* 593, discussing the same question, says:

“These police powers rest upon the maxim *salus populi est suprema lex*. This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from the owner, but a salutary

restraint on the noxious use by the owner, contrary to the maxim *sic utere tuo ut alienum non laedas.*'

"Both of these powers are equally clear in the common law; but neither of them can be said to warrant the legislature in imposing, directly or impliedly, without compensation, such an easement or servitude as defendant herein claims. The supreme court having held in the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, that the taking of property in the meaning of the prohibition clause in the Wisconsin constitution, similar in language to article 156, was sufficiently established to warrant indemnity where it was shown that any 'artificial structure was placed on the land, so as to effectually destroy or impair its usefulness to its owner,' or when it was shown that plaintiff's land was covered with water in consequence of the back water from a milldam, which was built according to state statute, went on to say:

" 'We do not think it necessary to consume time in proving that when the United States * * * parts with the fee, by patent, without reservation, it retains no right to take that land for public use without just compensation; nor does it confer such a right on the state within which it lies; and that absolute ownership * * * is not varied by the fact that it borders on a navigable stream.'

" 'This is the common-law doctrine as to easements, and this decision and others, notably the 51 N. H. 504, establishes the law as to what amounts to a taking of private property under the common-law rule, which is emphasized in article 156, State Const. 1879.'"

This rule certainly applies to the present case—there is no such "great emergency" here that it should be departed from.

The condition which led up to the Act of 1885 are well shown by the instructions issued by the Secretary

of the Interior just prior to the passage of the act (Instruction, 2 L. D. 640; see also the case of McKittrick and Andrews, 2 L. D. 638, upon which the instructions are apparently based). The evil sought to be remedied was the exclusive appropriation of large areas of the public domain without claim of title, by means of force, intimidation and fences. Never could it have entered into the consideration of Congress that any court could find in its act any authority to deprive a land owner of valuable property rights. No question of rights of way over private lands was in contemplation. True, the court in the Camfield case, considering the policy of the government, that its domain should be appropriated only in accordance with the public land laws, interpreted the statute in connection with the further doctrine of *nuisance* and thereby procured most substantial justice; but neither Congress nor the Supreme Court has ever intended to enact in the statute, or interpret into the statute, an intent on the part of the United States to appropriate valuable private property under the guise of a police regulation.

It is therefore submitted that (1) as the erection and maintenance of the fence lacks the intent to and does not make an exclusive appropriation of public lands and was intended to and did protect private property it is not a nuisance and cannot be *abated*; (2) as no right to abate as a nuisance exists the court has no right to order openings with the appropriations of rights of way over private land from the fencing necessary to protect the remainder of that land.

In conclusion we summarize the law points in our brief as follows:

1. The series of fences and fenced fields with all its openings, gaps and their accessibility to the through-roads is not *physically* an enclosure within the meaning of the act. The mere inconvenience of traveling around defendant's fields to the next opening does not make the series of fenced fields such an enclosure.

2. The series of fenced fields and fences if made with the *intent* of enclosing defendant's private land and only incidentally (if at all) impeding ingress or egress to the public land, is not an enclosure even if in the absence of a proper intent such a mere interference could be deemed an enclosure.

3. The fence in the absence of improper intent is not a nuisance, and the court's order for 20 openings is not an abatement but, with the 20 consequent rights of way which must be fenced, is a taking of private property for public use without compensation.

Respectfully submitted,

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Of Counsel.

No. 2143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GOLCONDA CATTLE COMPANY
(a corporation),

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING. WITH AN APPENDIX IN PARALLEL COLUMNS.*

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The merits of this appeal have never been argued in this court either on the law or the facts. It was our impression from the argument on the motion to dismiss that the findings of fact made by the lower court were to be accepted here and the brief of the government is also written on that theory. The opinion of this court, although setting forth some of the findings of the lower court and ignoring others, proceeds to restate them in discussion in a way which shows that the court does not accept those findings it has quoted, nor

*Appendix showing mistakes of the opinion, page 28 infra.

the government's exhibit, nor that of the appellant. Whether a rehearing be granted or not, a great injustice has been done the appellant in misstatements of facts agreed upon by both parties, and in omitting facts not contradicted by the government, all bearing on the accessibility of the government land and the purpose of the fences—an injustice which, we submit with all deference, can only be repaired by altering certain of the statements of the opinion.

Nor does the opinion mention the principal argument relied on by counsel—namely, the effect of granting twenty rights of way one hundred feet wide and from a quarter of a mile to a mile and a half long, across the land of appellant—rights of way which appellant must fence or let its rich bottom lands be open to the wandering bands of cattle from a radius of over fifty miles.

None of these things could have occurred, we believe, had the case been argued to the court on its merits, and we hope to show in this brief not only that such an argument is required to correct an injustice in the statement of fact, but that the court has erred as to the law in its decision, and is in plain violation of the *ratio decidendi* of the Camfield and other cases. We first point out what we feel certain are errors of fact, because they may throw more or less light on the questions of law, though the latter, of course, are of primary importance in this petition. A large part of the time of the hearing was taken up with the motion to dismiss. If full argument on the merits had been

undertaken the case would have laid over till the October term, as the calendar was full and the court to adjourn in a few days. As the company hoped to finish its fencing of its fields this summer the matter was submitted on the briefs.

I.

**ERRORS OF FACT AS TO ACCESSIBILITY AND USEFULNESS OF
THE PUBLIC LAND AND AS TO THE PURPOSES OF THE
FENCES.**

Some cases acquire an atmosphere which invests all other matters involved in them. What was primarily in the mind of the writer of the opinion is undoubtedly expressed in the following lines:

“That is to say, the Golconda Company, by maintaining miles of fence *along only the outside* of its own *eleven thousand acres* and connecting such fences with natural or other barriers, has separated one immense tract consisting not only of eleven thousand acres belonging to it, but also of twenty-six thousand acres of public land. The *serious significance* of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise one hundred and sixty-two homestead entries.”

Opinion, page 12.

These lines must be considered in connection with the earlier remarks concerning the history of the development of irrigation of the lands away from the river bottoms and their settlement for farming purposes.

And yet, when we come to examine the record, we find that these government lands are worthless for purposes of settlement. The district judge, who is himself familiar with this territory, says:

“The government land is *all rough and hilly*; it has a general slope toward the southwest, as well as an inclination from the central high land toward Willow Creek on the south, and to Rock Creek and Toejam Creek on the north and west. It affords only a *somewhat scant pasturage* for about *two months* in the early spring.”

Opinion, page 4.

Settlers are not going to plant farms at an elevation of between six and seven thousand feet above the sea, on land which naturally “affords only a somewhat scant pasturage for about two months in the early spring”. Nor are those poor and timid individuals going to invest their money in an irrigation system to put water on land which is “all rough and hilly”.

There is not a line of evidence in the case to show that any settler ever attempted to locate on the government lands in question, and it is absurd to suppose that any would. We do not believe that if we had had an argument of this case, the court would have laid the stress it did on the “serious significance” of the fences with reference to the “one hundred and sixty-two homestead entries”.

Another error of fact into which the court slipped is in regard to the location of the fences and the purposes they would serve. The court says:

“It is *not disputed* that the fences are along the *outside*, and not the *inside* of the cattle company’s lands.”

“That is to say, the Golconda Company, by maintaining miles of fence *along only* the outside of its own eleven thousand acres”, etc.

Opinion, pages 4, 12.

Not only is this fact disputed, but the evidence is incontrovertibly the other way. These bottom lands are rich and cultivable. Many of them had already been fenced on *both sides* and under cultivation, and *all* were in the process of being fenced on both sides, the wire was bought, the surveys made, and the stakes set for the line of fence posts. That is to say, instead of it being undisputed that the fences are ~~not~~ ^{only} along the outside of the cattle company’s land, it is undisputed that they were on the inside as to a large acreage of the land, and in process of construction as to all the land.

If there had been an argument, we would have learned that the court was going behind the findings of the lower court and the following uncontradicted evidence on this point would have been called to its attention:

“Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an enclosure to the westerly, which inclosure is inclosed *on the east side* by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT. Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN. It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary."

Record, page 164.

"A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below 'Opening No. 1-150' is it?

A. Oh, that is the lane, it comes to the lane."

"Q. It comes to the lane, and forms the northern boundary of the lane in there?

A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary.

A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes.

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

* * * * *

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN. Q. How long ago did you get that wire?

A. Bought that wire about two years ago."

Page 165

"Mr. DENMAN. Q. The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company."

Page 166.

“Q. What did you make it for?

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble Field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys for that purpose?

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; *to fence both sides of their land*; I had orders from the Golconda Cattle Company to that effect.”

Pages 190-191.

“The COURT. You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN. Q. You had a surveyor in your employ, and had the corner posts set up for the fence along the *north line* of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had it resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT. Q. Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir. They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to alfalfa, that is on company's land below that red line.

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS. 10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know."

"Mr. DENMAN. Q. That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT. Q. Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the *first time we had them protected*, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, in the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911, that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch."

Record, pages 186, 187, 188.

"Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them *in* and *outside*, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences *on the inside*?

A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir."

Record, page 193.

"Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain.

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening out into the country beyond?

A. Yes.

Mr. DENMAN. Q. What is this country beyond—is it a high mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is in an open range.

Q. That is an open range in here, it is?

A. Yes.

Q. How about the condition of the feed between the point marked 'Opening No. A', and North's fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks?

A. Certainly."

Record, pages 170, 171.

“Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. *One was to steer cattle up to the mountain, and the other purpose was the company's intention of fencing their own lands.*”

Record, pages 213, 214.

“MR. PLATT. Q. Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out?

A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it?

A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is to keep it out, because that—

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. **As I said before, the fence was built with the object of helping steer stuff up, and at the same time with the object of building the fence, was for the company to fence their lands.**

Q. **To steer stuff up where?**

A. **Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.**

The COURT. Haven't we been over that already?

WITNESS. We have been over it time and again.”

Record, pages 214, 215.

This testimony regarding the excellence of the grazing to the northeast of the territory in question is also

uncontradicted. It was higher, the snow melted later, the grass and other feed lasted later in the summer. The company's fence did not hold the cattle in, but it had a tendency to "steer" or drift the cattle of the company along its creek bottoms to this summer feed and prevent them from wandering off to the easterly or westerly.

This temporary usefulness of the company's outside fence as a drift fence, while the fence on the inside was being gradually constructed, and the bottoms put into enclosed pastures or cultivated fields, cannot be taken as its final purpose. There is not a line of testimony in the record questioning the *bona fides* of this ultimate purpose, namely, a completion of the partial enclosure, towards which the work was well advanced when these suits were commenced, May 31, 1911.

It is submitted that the court could not have had this undisputed testimony in mind when it lays such stress on what it calls the "undisputed fact" that "the fences are along the *outside* and not the *inside* of the cattle company's land". Nor could it have had in mind the government's own exhibit No. 1, where the *inside* fences are clearly shown,—*some eleven miles of them*.

We urge that the misstatements of the opinion in this matter, which the court finds so important, warrant a rehearing.

An equally clear mistake has been made in the court's description of the openings. There are two great gaps in the fence,—*one over a mile and a quarter long* at the northeasterly end of the territory, and the

other 3400 feet long at the southeasterly end. The opinion entirely misdescribes the larger opening, and mislocates the 3400 foot opening as in the mountainous country at the northeast.

The statement of the court as to the 3400 foot opening is as follows:

“Nor does the additional fact that in such a length of fence there is a gap of approximately thirty-four hundred feet, *left at the foot of a mountain where the country is rough*, necessarily exclude the area surrounded by the fences which lead up to the sides of the *rocky gap* from the definition of an enclosure as meant by the act. It is not enough that a would be settler can pass through *such a gap* if he follows along miles of fence and turns in and goes *over the rocky place*, or that cattle may do likewise, or that they do to some extent enter through and graze upon the lands inside.”

Opinion, page 13.

There is not a line of evidence to support this statement concerning the 3400 foot opening. On the contrary, the lower court found as follows:

“Gap No. 6 is about 3400 feet long, and is favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains.”

Record, page 26 (small volume).

This finding is based on the testimony of the witness, McClellan, offered by the government and accepted by defendant.

“Mr. DENMAN. Q. Can you tell me through what portion of the country south of this general map here, the cattle com-

ing from the south in the spring time would naturally pass in, working up to the higher country beyond; where would they come up?

* * * * *

A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north, principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast of the quarter section corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate?

A. That is a watering place.

* * * * *

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the spring-time with reference to direction of travel?

* * * * *

Mr. DENMAN. Q. The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north."

Record, pages 254, 255.

"Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here.

A. That is Willow Creek.

Q. Is there any Creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a

natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running out through 32. and back around past 31, surrounding that opening at that point?

A. It is.

Q. And that valley is a natural gathering place for cattle?

A. The cattle drift into it from the south and the east.

Q. There is a road coming there, isn't there?

A. A road right by.

Q. What road is that?

A. Tuscarora road passes right by there.

Q. Isn't there another road there also?

A. Another road comes over the Tie Corral country.

Q. How is "Tie" spelled?

A. Railroad ties, that is all the name I know it by.

Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?

A. Right in that spot.

Q. And go through that opening?

A. They could, or go around the blue country, either one."

Osborn, pages 175-176.

Not only does the opinion ignore the finding of the lower court and the testimony of the government's witness (and three others) but also the government's map, which places opening No. 6 at the southeast end of the map and *alongside the main highway of the whole territory, i. e., the Midas, Tuscarora County, road.* All the court's remarks about the "would be settler" reaching this gap after "following miles of fence" and "turning in and going over a rocky place" are a cruel injustice to the company. It represents the opening as an evasion, a sham, and coming from this court is a permanent record damning its good faith.

It is submitted that on a rehearing this court would not find that the 3400 foot opening alongside the county road and main highway of the country for "would be settlers"—at a point which was the natural gathering place for cattle from the neighboring country to reach the government territory on the other side of defendant's property—warranted such a description as is given it in the opinion, nor the inference drawn.

The opinion represents the large opening at the northeast end as having North's fence across it. The language is:

"At one point a mile and a half of fence, called 'North's fence', is in bad repair and down at places. Granted that cattle will sometimes drift, more or less reluctantly, over wire fence which is down, it is nevertheless true that even a fence partly down is a visible tangible barrier, and where there are over forty miles of fence surrounding an area of public land, *with only eight or nine narrow openings therein, the fact that in a rocky rough section a mile and a half of the fence is in bad repair and partly down* does not necessarily make the surrounded area any the less enclosed, within the meaning of the statute."

Opinion, page 13.

The truth, as the government map, the findings of the lower court and all the witnesses show, is that the large opening in the northeast end of the territory *begins* at North's fence and extends to the southeast from it without any structure at all in it. And yet the opinion, given without argument, rams home the ex-

istence of a fence across this gap, and makes the defendant's defense on this point, as on the 3400 foot opening, seem a mere sham and fraud. We feel confident that this error alone should grant us a rehearing.

The adjective "narrow" conveys the idea that the other gaps left by the company are in themselves insufficient. There are in fact ten other gaps ranging from 500 to 100 feet in width. *One hundred feet is all that the decree appealed from requires.*

The opinion is also in error as to the nature of the country at the northeast portion of the map. The long snake-like barrier described on the government map was shown by the testimony of *every one* of seven witnesses not to exist in the place described. The government's witness, McClellan, tells us that instead of running in the general northwesterly and southeasterly directions, as it is drawn, to close the gap, it runs easterly and westerly and bears south of west.

McClellan says, at pages 256, 257 and 258:

"Mr. PLATT. Q. Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as 'Toejam Mountain' is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

* * * * *

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about 4 miles east of this country."

McClellan, pages 256, 257, 258.

Its true position is shown on defendant's map in evidence which is based on an actual survey of the land. It fills less than a fifth of the space of the gap and is nearly a mile from it.

Defendant's Ex. "A"; Tilden, pages 446 to 466, *et seq.*

A wagon could be driven over it (Thornton, p. 660). A survey showed that a railroad could be built on natural grade over the very place where the snake-like object appears (Tilden, pp. 549 to 569). Two disinterested witnesses, Mr. Lamb, the sheriff of the county, and Mr. Sheehan, the manager of the bank at Winne-

mucca, crossed the mile and a quarter gap at the northeast corner shortly before the trial. They identified all the places in the fences on the government map. Both testified that the $1\frac{1}{4}$ mile opening had easy grazing ground on both sides, with abundant summer feed. Neither *could find the barrier across opening 5 described in the government map as Toejam Mountain.*

Sheehan, page 491;

Lamb, page 335.

On cross-examination, Inspector Flocker admitted that the so-called barrier would not stop cattle (434) and that he had never been within a mile of it (p. 425). Melrose, the other government inspector, was present at the trial but was not asked any question about this barrier. The government offered no evidence to contradict the defendant's unanimous testimony that this higher country at the northeast corner of the territory in question was the natural *summer* feeding ground where the stockmen desired their cattle to go as the lower country feed was exhausted.

How unfair to the defendant is the attempt of the opinion to show that the higher country to the northeast merely completed, with the fences, a barrier to the government land, whereas in fact the fences acted as an aid to get the cattle *up to* this higher land which was the objective in summer of all the cattle of that vicinity. The fences were for the purpose of getting the cattle *through* gap No. 5, not to stop them at that point. If there had been a full argument of this case,

would this court have held that it was illegal to build on one's own land *drift fences* to shape up cattle to the summer feeding grounds? Would it have put the defendant in the position of having left openings which were a mere sham and a fraud? This is the impression the opinion leaves. It is not warranted by the facts, nor by the findings of the court below, which squarely state that the defendant was endeavoring to comply with the law.

The portion of the opinion referring to the reluctance of the Nevada range cow in passing over barb wire lying on the ground, is also not supported by the record. The fence posts of the North fence were *down*, the wires *broken*, and much of them *coiled up*.

Testimony Lamb, p. 354.

We thus see that practically every statement of fact as to the important openings and their accessibility on which the court relies for its argument that there is an enclosure, is not only absolutely unsupported by the evidence, but is squarely contradicted by the government map, the government's witnesses, our witnesses and the findings of the lower court. To recapitulate:

(1) The opinion finds the mile and half opening to have North's fence across it. North's fence is in another place, the opening unobstructed and a natural pass and feeding ground for cattle.

(2) The opinion finds the 3400 foot opening in a mountainous and inaccessible place, most difficult for the "would be settler" to reach. The fact is the opening is in a valley, the natural gathering place for

cattle, and alongside the Tuscarora Midas road, the main thoroughfare of the country.

(3) The opinion describes the company's fences as all being on the *outside* of its lands and a most damaging inference is drawn as to intent. The fact is that its lands are fenced on both sides for a large portion of their area and in process of being fenced on all sides for their entire area.

(4) The argument is made that the fencing is obstructing the settlement of 162 homesteads. The lower court finds, and the fact is, that the government land is rough, hilly and unproductive and utterly unfit for homesteading.

(5) The cattle are described as reluctantly passing over North's fence wires. The wires in fact are broken and coiled up and the reluctant Nevada steer would have to do some jumping (which we admit he could) to pass over them.

(6) The whole opinion is flavored with the suggestion that the defendant is a cattle company which has taken up the bottom lands solely to enable it to control the government grazing land between and generally acting in bad faith about it. The fact is that the company is engaged in civilizing the country, erecting great dams and irrigation works, changing range land into grain and alfalfa fields, AND THE EVIDENCE ON THIS POINT, SO EASY OF REFUTATION, IS ABSOLUTELY UNCONTRADICTED.

It is submitted that on rehearing this court may well hold that fences do not constitute an enclosure which

have between them one *unobstructed* opening of a mile and a half, and another of 3400 feet, both in natural passes for cattle, and the latter alongside the main highway, where it would hold that they do constitute an enclosure if these gaps are mere shams, filled with obstructing fences, and placed in rough and inaccessible places.

II.

THE GRANTING OF TWENTY RIGHTS OF WAY ACROSS THE GRAIN AND ALFALFA FIELDS, AND THE FENCING OF THE SAME.

It is undisputed that practically every acre in the bottoms belonging to the defendant is rich arable land. It is not disputed that a large portion of their area was fenced on the *inside* and under cultivation, and that the building of the remainder of the inside fence was under way when these suits were begun. The effect of the court's decree then must be considered with a view to the immediate use to which the lands were to be put.

The decree requires twenty openings in the fence, of a hundred feet in width, so placed that there are required thirteen in addition to the thirteen now existing. It is apparent this means that unless these openings are fenced clear through to the inside of the company's lands, they will admit everyone's cattle to the grain, alfalfa, or potato fields of the defendant. Now this effect of the decree must be construed as well as its mere words, in determining whether it is warranted by the law. The question is, can the court, in

the guise of abating fences on one's own land, having many accessible and unobstructed openings, one a mile and a half in length and another 3400 feet in length alongside the general highway, require the owner to surrender thirteen additional strips of land 100 feet wide and from a quarter of a mile to a mile and a half across its cultivated lands, to make the access of straying cattle more "convenient"?

Did Congress intend to upset the law of real property to this extent? If it did, no case has yet said so, and the opinion of the court in *Camfield v. United States* directly negatives this construction, saying:

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections.

"So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor, but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large."

Camfield v. United States, 167 U. S. 518, at 527-528.

The case of *Homer v. United States*, which is the extreme to which any case has gone, requires but one

opening in a fence *twenty-five miles* long on the outside of the defendant's land, a mere right of way of necessity. The language of the court is as follows:

“And that *such an opening* should be made in the general inclosure as will allow free ingress and egress to the public lands in question.”

Homer v. United States, 185 Fed. 741, at 747.

Even to this decision there is a vigorous dissent by Judge Van Devanter, at page 749.

This court in the case of *Thomas v. United States*, 136 Fed. 159, at page 161, clearly holds the fence an enclosure only because it did not have *one* substantial opening.

In *United States v. Johnson*, 172 Fed. 635, there were but two inaccessible openings in many miles of fence.

In no case we have examined has more than one substantial opening, conveniently located, been held necessary to make the fencing not an enclosure.

It is submitted that while there should in any event be a reargument as to the facts in this case, the proposition of law that it is the right of the government to take from its grantee these thirteen additional strips of land, over the openings already maintained, containing many acres of rich bottom, bisecting its fields in many places and destroying their continuity for tillage or grazing, and devote them to highways for the straying stock of strangers, is so startling that it is at least entitled to a full hearing before this court.

III.

INTENT.

Concerning the intent of the defendant, the opinion uses the following language :

“If it were necessary for the court to deduce an intent from the facts we should have to say that the reasonable inference to be drawn *from the situation of the fences and the fact that they were placed as they were* is that the appellant intended to maintain an enclosure of public lands. But we do not deem it material to the case.”

Opinion, page 16.

This is a most damning sentence to have written into the records and reports of this court. It is evidently based on the misapprehensions we have above pointed out and cannot in any fairness, we submit, be left in the opinion without a correction of its description of the “situation of the fences” and “where they were placed”.

Any one reading the opinion will naturally exclaim, “The land grabbers! With their so-called mile and a half gap almost closed by North’s fence, and their 3400 foot gap hidden away under a mountain in an inaccessible place! It is as plain as day they were *intending* to enclose public lands! How could anything so raw have been defended for a moment! And all their fences on the outside too. So their cattle and no one’s else could get on government land! And all those 162 homesteads just waiting for the poor settlers and their irrigation ditches!”

Our contention is that the court *should* have passed on the intent, and we are certain that the reason why the theory and cases so carefully developed in our opening brief are not considered by the opinion is because the court erroneously felt that a scheme, so patently a sham, shows its *mala fides* on its face, and that a searching consideration of the question of intent was not necessary.

But there is not a line of testimony in the case which, properly considered, lends support to any inference of *mala fides* and the findings of the lower court are clearly to the contrary.

The Supreme Court in the Camfield case had before it the opinion of the Circuit Court of Appeals holding that intent is no part of the defense under Section 1 of the Act of 1885. Instead of following the reason of the lower tribunal the *ratio decidendi* the Supreme Court is based entirely on intent. Through paragraph after paragraph it proceeds to find the sham and *mala fides* of the defendant. And it bases that *ratio decidendi* on the Massachusetts cases which make "malice" the essence of certain nuisances which the state statutes make abatable in provisions very similar to the statute now before us.

The effect of this decision is to make a tremendous extension of the right to appropriate private property without compensation. We pray that before it becomes final, argument may be had before the court worthy of the weight of the principles and the startling nature of this application in the appropriation of many acres of the appellant's land under the decree here approved.

We therefore pray that the court rehear the case; (1) that it may undo the injustice unconsciously done the defendant in the statement of facts and the deductions therefrom; (2) that it may further consider the question whether the fences constitute an enclosure in view of the real facts in the case; and (3) that it may hear argument on the question of intent as a factor in determining whether fences which have many gaps adjacent to the main thoroughfares in them do or do not constitute an enclosure under the Act of 1885.

And your petitioner will ever pray.

CHARLES R. LEWERS,
WILLIAM DENMAN,
Solicitors for Petitioner.

G. S. ARNOLD,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, William Denman, one of the solicitors for the petitioner in the foregoing petition for rehearing, do hereby certify that in my judgment this petition is well founded, and that it is not interposed for delay.

WILLIAM DENMAN,
Solicitor for Petitioner.

The errors of the opinion and the real facts appear in parallel columns in the appendix on the succeeding pages.

APPENDIX.

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“It is **not disputed** that the fences are along the **outside, and not** the inside of the cattle company's lands, so that between the fences and appellants' lands lies the large area of public domain involved here. It is impossible to gain access to this land **except by crossing land which belongs to the cattle company,*** either through certain openings in the fences purposely made by the cattle company, or the opening of **3400 feet situate in the NORTHeastern part of the tract lying at the foot of Toejam Mountain.**”

Opinion, pages 4-5.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

*There is no evidence that the land on which are North's fence and Noble's fence and the 1¼ mile gap belongs to the appellant. On the contrary it belongs to other private parties and no other contention was made by the government.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

It is not disputed that **all** the fences are **not** along the outside of the cattle company's lands, a **very considerable** part of the fences being on the inside, and enclosing the company's lands into cultivated fields. It is not disputed that all the company's lands were in process of being thus enclosed on the inside, and the work was progressing at the time the government litigation was commenced, so that when the fencing scheme was completed, there would lie between the inside fences on appellant's lands, the large area of public domain involved here. It is impossible to gain access to this land except by crossing land which belongs **either** to the cattle company **or to other private owners**, either through certain openings in the fence purposely made by the cattle company, including an opening of 3400 feet situate on the **SOUTHeastern** corner of the tract, lying alongside the Tuscarora Midas road, the main thoroughfare of the country, or the opening of a mile and a quarter situate at the **NORTHeastern** part of the tract, lying distant about four miles from Toejam Mountain, through which pass the regular lines of cattle travel going to and from the higher summer feeding ground beyond.

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“That is to say, the Golconda Company, by maintaining miles of fence **along only the outside** of its own eleven thousand acres and **connecting such fences with natural or other barriers**, has separated one immense tract consisting not only of eleven thousand acres belonging to it but also of twenty-six thousand acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise one hundred and sixty-two homestead entries.”

Opinion, page 12.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

That is to say, the Golconda Cattle Company, by maintaining miles of fences along **both the inside and the outside** of its own 11,000 acres, which fences were **disconnected** with any natural barriers, **but in one place left an opening of a mile and a half long**, through which passed the regular cattle trails into the higher mountain country beyond and over practically the entire area of which cattle could cross with freedom, and with another opening 3400 feet in length, alongside the main highway, in a valley which is the natural gathering place of cattle to pass on to the government land beyond, has separated one immense tract, consisting not only of 11,000 acres belonging to it but also of 26,000 acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers **with their two miles and over of openings** there is public land more than sufficient to comprise 162 homestead entries on territory that is "all rough and hilly" and "affords only a somewhat scant pasturage for about two months in early spring".

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“And where there are over forty miles of fence surrounding an area of public land, with only eight or nine narrow openings therein, the fact that in a **rocky rough section** a mile and a half of the fence is in bad repair and partly down does not necessarily make the surrounding area any the less enclosed, within the meaning of the statute. Nor does the additional fact that in such a length of fence there is a gap of approximately thirty-four hundred feet, **left at the foot of a mountain where the country is rough**, necessarily exclude the area surrounded by the fences which **lead up to the sides of the rocky gap** from the definition of an enclosure as meant by the act. It is not enough that a would-be settler can pass through **such a gap** if he **follows along miles of fence** and turns in and **goes over the rocky place**, or that cattle may do likewise, or that they do to some extent enter through and graze upon the lands inside.”

Opinion, page 13.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

And where there are over forty miles of fence surrounding an area of public land, with eight or nine openings therein, each as large or larger than the openings ordered by the decree of the lower court, the fact that in a rough rocky section there is a gap of a mile and a quarter through which the cattle have customarily passed to the feeding grounds beyond, and over which they can cross without difficulty and which is itself a natural grazing ground for cattle, does not necessarily make the surrounding area any the less enclosed within the meaning of the statute. Nor does the additional fact that in the length of fence there is a gap of approximately 3400 feet left in a natural gathering place for cattle, and alongside the country road which is the main thoroughfare of the country, necessarily include the area surrounded by the fences which lead up to the gap in this valley and alongside the road, from the definition of an enclosure as given by the act. It is not enough that a would-be settler can pass through such a gap if he follows along the county road and main highway and turns in and goes over the smooth valley, or that the cattle may do likewise, or that very large numbers of cattle of different brands coming from over fifty miles away enter through these openings and cross upon the lands inside and no cattle are shown to have been kept from the government lands or any complaint shown in that regard.

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“The consequences of a contrary view might lead to a practical withdrawal of much public lands from the general domain, for by building miles of fences about public lands but leaving only one or two small openings, **and one larger one, in a remote and inaccessible place,** one could obtain the benefits of an enclosure yet say he was not maintaining an enclosure and so defeat an action to have such an enclosure removed under Section 1 of the Act.”

Opinion, page 14.

“It is said that enforcement of the decree of the District Court may be an invasion of the constitutional rights of the appellant, in that it would constitute a taking of private property for public use. But under the doctrine laid down by the Supreme Court in the *Camfield* case, *supra*, the United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be **some inconvenience** or **slight** damage to individual proprietors. There being nothing in the facts, of this case to take it out of this rule, we must hold that no rights of appellant have been infringed.”

Opinion, last paragraph.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

The consequences of a contrary view may lead to the practical withdrawal of much public land from the general domain, for by building miles of fences about public lands but leaving only **thirteen** openings as large or larger than those ordered by the court and two others, one a mile and a quarter long, through which passed the usual cattle trails into the higher mountains and over the whole area of which cattle have always passed and grazed, and another one 3400 feet in length, in an accessible place, alongside the county road and main highway, and in a valley which is a natural gathering place for cattle desiring to graze over the government land, one could obtain the benefits of an enclosure yet say he was not maintaining an enclosure and so defeat an action to have such an enclosure removed under section one of the act.

But under the doctrine laid down by the Supreme Court in the Camfield case, supra, the United States has clear right to legislate for the protection of the public lands by exercising what is called the police power, even though it involve taking twenty rights of way, 100 feet wide and from a quarter of a mile to a mile and a half long, which must be fenced on both sides by the owner of the land in order to prevent straying cattle from getting at his rich bottom lands planted to alfalfa and grain. There being nothing in the facts of this case to take it out of this rule, and we must hold that no rights of appellant have been infringed.